86-44

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

SHEARSON/AMERICAN EXPRESS INC. and
MARY ANN MCNULTY,

Petitioners,

v.

EUGENE MCMAHON, JULIA MCMAHON, individually and as trustees of THE DAVID J. HODDER & SON, INC. EMPLOYEE PENSION PLAN; THE DAVID J. HODDER & SON, INC. PROFIT SHARING PLAN; THE LAURIE FUNERAL HOME, INC. EMPLOYEE PENSION PLAN; and THE LAURIE FUNERAL HOME PROFIT SHARING PLAN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Are federal district courts barred from enforcing agreements to arbitrate claims arising out of contractual relationships if those claims assert an implied right of action under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78a, *et seq.* (1982) (the "Exchange Act")?

2. Did Congress intend to create an exception to the United States Arbitration Act, 9 U.S.C. § 1, *et seq.* (1982), for claims under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, *et seq.* (1982) ("RICO"), and require that all civil RICO claims be litigated in federal court, even if the parties have agreed to arbitrate those claims?

RULE 28.1 LIST

Non-Wholly Owned Subsidiaries and Affiliates of Shearson Lehman Brothers Inc.

Active Subsidiaries

Boston Hambro Corp.
Boulevard Investors Inc.
Boulevard Real Estate Corp.
Burlington Investors Inc.
E.B. Realty
Lombard Realty Corporation
Lowell Investors Inc.
Lowell Real Estate Corp.
Shearson Dat-Cheong Company Limited
Shearson Lehman/Finanz AG
Shearson/KM, Inc.

Inactive Subsidiaries

Genex Insurance Brokerage Ltd.
Mideast-American, Inc.

Affiliates

California S.A.
Shearson Financial Services of Oklahoma, Inc.
Shearson Financial Services of Texas, Inc.
Shearson Lehman Brothers SARL
Intermodal Equipment Associates
KCC Syndicate Managers, Inc.
McLeod Young Weir Limited
New World Corporation
Rex Moor Properties Incorporated
Sovran Energy Corp.

Non-Wholly Owned Subsidiaries and Affiliates of Shearson Lehman Brothers Holdings Inc., the parent company of Shearson Lehman Brothers Inc.*

American Express Asset Management Limited
American Express Asset Management N.V.
American Express Asset Management S.A.
American Express U.K. Holding Company Inc.
FGIC Corporation
Kuhn Loeb Lehman Brothers International B.V.
Lehman Brothers International UK Ltd.
Lehman International Finance N.V.
Lehman Overseas N.V.
LBKL 82-1 Investors Inc.
Shearson Lehman Broadgate North Inc.
Shearson Lehman Broadgate South Inc.

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* The parent company of Shearson Lehman Brothers Holdings Inc. is the American Express Company.

TABLE OF CONTENTS

	Page
Questions Presented	i
Rule 28.1 List	ii
Table of Authorities	vii
Statutory and Regulatory Provisions Involved	xvi
Opinions Below	2
Jurisdiction	2
Statement of the Case	3
Reasons for Granting the Writ	4
I. This Court Should Grant Certiorari to Resolve The Conflict Among the Circuits As to Whether Congress Intended to Prohibit the Enforcement of Agreements to Arbitrate Claims Arising Under § 10(b) of the Exchange Act	6
A. The Second and Eighth Circuit Courts of Appeals are in Direct Conflict As to Whether the *Wilko v. Swan* Exception to The Arbitration Act for Claims Under § 12(2) Of the Securities Act of 1933 Should Be Extended to Claims Under § 10(b) of the Exchange Act	6
1. The Second Circuit's decision in this case rests upon its own precedent extending *Wilko v. Swan* to § 10(b) claims, and its own view of public policy, rather than any analysis of Congressional intent	7
2. The Eighth Circuit's decision in *Phillips* rests upon this Court's recent pronouncements questioning the applicability of *Wilko v. Swan* to § 10(b) claims and the explicit Congressional mandate favoring arbitration	10

Page

3. The Second Circuit's decision conflicts with the clear intent of Congress and with this Court's recent decisions 13

4. The conflict among the circuits can only be resolved by this Court 15

B. The Continued Conflict and Confusion Among the Lower Courts Over the Applicability of *Wilko v. Swan* to § 10(b) Claims Requires Early Resolution in Order To Avoid Increased Congestion in the Lower Courts 16

II. This Court Should Grant Certiorari to Decide Whether, in Enacting the RICO Statute, Congress Intended to Exempt All Civil RICO Claims From the Coverage of the Arbitration Act 18

A. The Enforceability of Agreements to Arbitrate Civil RICO Claims is An Unresolved and Important Question of Federal Law, and the Second Circuit's Decision Will Only Increase the Conflict Among the District Courts on This Issue . . . 20

B. The Second Circuit's Decision in This Case Is in Direct Conflict With Congressional Intent, and Will Needlessly Burden the Courts and Litigants Unless it is Reviewed And Reversed 23

1. There is no evidence that Congress intended to create an exception to the Arbitration Act for all civil RICO claims . 23

2. Civil RICO claims rarely implicate public policy, as they almost always involve simple commercial disputes 25

Conclusion 28

Page

Appendices

A. Statutory and Regulatory Provisions Involved A-1

B. Opinion of the United States Court of Appeals for the Second Circuit A-6

C. Opinion of the United States District Court for the Southern District of New York..... A-19

D. Judgment of the United States Court of Appeals for the Second Circuit, entered on April 16, 1986 ..... A-30

E. District Court Cases Addressing the Enforceability of Agreements to Arbitrate § 10(b) Claims A-32

F. District Court Cases Addressing the Enforceability of Agreements to Arbitrate Civil RICO Claims A-43

TABLE OF AUTHORITIES

Cases	Page
AFP Imaging Corp. v. Ross, 780 F.2d 202 (2d Cir. 1985), *cert. denied* (United States June 30, 1986)	7
Allegaert v. Perot, 548 F.2d 432 (2d Cir.), *cert. denied*, 432 U.S. 910 (1977)	2, 7, 8
American Concept v. Irsay, No. 84 C 10026 (N.D. Ill. Oct. 4, 1985) (appeal pending)	20
American Safety Equip. Corp. v. J.P. Maguire & Co., 391 F.2d 821 (2d Cir. 1968)	*passim*
Austad v. Drexel Burnham Lambert, Inc., No. 85-C-9759 (N.D. Ill. Mar. 27, 1986)	18
Ayres v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 538 F.2d 532 (3rd Cir.), *cert. denied*, 429 U.S. 1010 (1976)	8
Bale v. Dean Witter Reynolds, Inc., 627 F. Supp. 650 (D. Minn. 1986)	24, 26
Belke v. Merrill Lynch, Pierce, Fenner & Smith, 693 F.2d 1023 (11th Cir. 1982)	8
Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975)	17
Bob Ladd, Inc. v. Adcock, 633 F. Supp. 241 (E.D. Ark. 1986)	24, 26
Brener v. Becker Paribas Inc., 628 F. Supp. 442 (S.D.N.Y. 1985)	24, 26
Coenen v. R.W. Pressprich & Co., 453 F.2d 1209 (2d Cir.), *cert. denied*, 406 U.S. 949 (1972)	8

Page

Colonial Realty Corp. v. Bache & Co., 358 F.2d 178 (2d Cir.), *cert. denied*, 385 U.S. 817 (1966) 7

Comm'r v. Bilder, 369 U.S. 499 (1962) 23

Congregation Beth Yitzhok v. Briskman, 566 F. Supp. 555 (E.D.N.Y. 1983) 26

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Dean Witter Reynolds, Inc. v. Byrd, 105 S. Ct. 1238 (1985) ..... *passim*

De Lancie v. Birr, Wilson & Co., 648 F.2d 1255 (9th Cir. 1981) 8

Erlbaum v. Erlbaum, [1982] Fed. Sec. L. Rep. (CCH) ¶ 98,772 (E.D. Pa. July 13, 1982) 26

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Gorman v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 609 F. Supp. 1054 (S.D. Fla.), *aff'd*, 780 F.2d 1032 (11th Cir. 1985) (*en banc* rehearing pending) 15

Greater Continental Corp. v. Schechter, 422 F.2d 1100 (2d Cir. 1970) 7

Halliburton & Assocs., Inc. v. Henderson, Few & Co., 774 F.2d 441 (11th Cir. 1985) 8

Page

Haroco, Inc. v. American Nat. Bank and Trust Co., 747 F.2d 384 (7th Cir. 1984), *aff'd*, 105 S. Ct. 3291 (1985) (per curiam) 25

Herman & MacLean v. Huddleston, 459 U.S. 375 (1983) 6

Huss v. Goldman, Sachs & Co., No. 86-C-2680 (N.D. Ill. May 13, 1986) 26

Jacobson v. Merrill Lynch, Pierce, Fenner & Smith, Inc., [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,276 (W.D. Pa. Apr. 19, 1985) (appeal pending) 20, 24

King v. Drexel Burnham Lambert, Inc., No. 85-1717 (5th Cir. May 28, 1986) 16

King v. Lasher, 572 F. Supp. 1377 (S.D.N.Y. 1983) 27

Mansbach v. Prescott, Ball & Turben, 598 F.2d 1017 (6th Cir. 1979) 8

Martin-Trigona v. D'Amato & Lynch, 559 F. Supp. 533 (S.D.N.Y. 1983) 26

Massachusetts Trustees v. United States, 377 U.S. 235 (1964) 23

McMahon v. Shearson/American Express, Inc., 618 F. Supp. 384 (S.D.N.Y. 1985), *aff'd in part, rev'd in part*, 788 F.2d 94 (2d Cir. 1986) . *passim*

McMahon v. Shearson/American Express, Inc., 788 F.2d 94 (2d Cir. 1986) ..... *passim*

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker, [Current] Fed. Sec. L. Rep. (CCH) ¶ 92,781 (S.D.N.Y. June 14, 1986) 9

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Moore, 590 F.2d 823 (10th Cir. 1978) 8

Page

Miller v. Drexel Burnham Lambert, Inc., [Current] Fed. Sec. L. Rep. (CCH) ¶ 92,783 (11th Cir. June 17, 1986) (per curiam) 15

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 105 S. Ct. 3346 (1985) ..... *passim*

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New York v. Saper, 336 U.S. 328 (1949) 23

Phillips v. Merrill Lynch, Pierce, Fenner & Smith, Inc., No. 85-5156 (8th Cir. July 9, 1986) ..... *passim*

Pit Pros, Inc. v. Wolf, 554 F. Supp. 284 (N.D. Ill. 1983) 26

Posadas v. Nat. City Bank, 296 U.S. 497 (1936) .. 23

Price v. Drexel Burnham Lambert, Inc., [Current] Fed. Sec. L. Rep. (CCH) ¶ 92,790 (5th Cir. June 11, 1986) 6

Randall v. Loftsgaarden, No. 85-519 (United States July 2, 1986) 8, 23

Roes v. Paine, Webber, Jackson & Curtis, Inc., No. C84-2311A (N.D. Ga. Mar. 29, 1985) 21

Ross v. Mathis, 624 F. Supp. 110 (N.D. Ga. 1985) 19, 24, 27

Russell v. Shearson Lehman Bros., Inc., No. CA3-85-2335-R (N.D. Tex. Mar. 10, 1986) (appeal pending) 20

Page

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Sacks v. Dean Witter Reynolds, Inc., [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,429 (C.D. Cal. Dec. 31, 1985) 24, 27

San Martine Compania de Navegacion v. Saguenay Terminals, Ltd., 293 F.2d 796 (9th Cir. 1961)..... 9

Schacht v. Brown, 711 F.2d 1343 (7th Cir.), *cert. denied*, 464 U.S. 1002 (1983) 18

Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974) 10, 13

Sedima, S.P.R.L. v. Imrex Co., 105 S. Ct. 3275 (1985) 18, 22

Shapiro v. United States, 335 U.S. 1 (1948)..... 23

Shotto v. Laub, 632 F. Supp. 516 (D. Md. 1986). 18

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Smoky Greenhaw Cotton Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., [Current] Fed. Sec. L. Rep. (CCH) ¶ 92,767 (5th Cir. May 13, 1986) (per curiam) 20, 22

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Steinberg v. The Illinois Co., No. 85-C-7131 (N.D. Ill. May 15, 1986) 18, 27

Page

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United States v. Will, 449 U.S. 200 (1980) 23

United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960) 14

Universal Marine Ins. Co. v. Beacon Ins. Co., 588 F. Supp. 735 (W.D.N.C. 1984) 21

Washington v. Miller, 235 U.S. 422 (1914) 24

Webb v. R. Rowland & Co., 613 F. Supp. 1123 (E.D. Mo. 1985) (appeal pending) 20

Weissbuch v. Merrill Lynch, Pierce, Fenner & Smith Inc., 558 F.2d 831 (7th Cir. 1977) 8

West v. Drexel Burnham Lambert, Inc., 623 F. Supp. 26 (W.D. Wash. 1985) 26,27

Wilcox v. Ho-Wing Sit, 586 F. Supp. 561 (N.D. Cal. 1984) 21

Wilko v. Swan, 346 U.S. 427 (1953) ..... passim

Witt v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 602 F. Supp. 867 (W.D. Pa. 1985) 21

Statutes and Regulations	Page
Sherman Act, 15 U.S.C. § 1, *et seq.*	14
Securities Act of 1933, 15 U.S.C. § 77a, *et seq.*	7
Section 12(2), 15 U.S.C. § 77 l (2)	7
Section 14, 15 U.S.C. § 77n	7
Securities Exchange Act of 1934, 15 U.S.C. § 78a, *et seq.*	2
Section 10(b), 15 U.S.C. § 78j(b)	2
Section 19, 15 U.S.C. § 78s	9
Section 29(a), 15 U.S.C. § 78cc(a)	11
Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, *et seq.*	2
18 U.S.C. § 1962	3
18 U.S.C. § 1964(b)	19
18 U.S.C. § 1964(c)	2
United States Arbitration Act, 9 U.S.C. § 1, *et seq.*	3
9 U.S.C. § 2	13
9 U.S.C. § 3	3
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1292(a)(1)	4

Articles	Page
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Other Materials	
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Arbitration Rules 600-634 of the New York Stock Exchange, Inc., 2 N.Y.S.E. Guide (CCH) ¶¶ 2600-2634	9
Committee on Federal Legislation, "Reform of the Private Civil Action Provision of RICO," 41 *The Record of the Association of the Bar of the City of New York* 412 (May 1986)	19
Communication from Elizabeth McGrath, Chief, Judicial Information Branch, Statistical Analysis and Reports Division, Administrative Office of the United States Courts, Washington, D.C., dated June 27, 1986	22
Constitution of the New York Stock Exchange, Inc., 2 N.Y.S.E. Guide (CCH) ¶¶ 1351-1357 ..	9

Page

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Speech by Chief Justice Warren E. Burger to the American Arbitration Association and the Minnesota Bar Association, on August 21, 1985, reported by UPI on the same date 17

Speech by Chief Justice Warren E. Burger at New York University on November 18, 1982, reported in the Christian Science Monitor on November 24, 1982..... 17

Uniform Code of Arbitration, N.A.S.D. Manual (CCH) ¶¶ 3712-3743 ..... 9, 27

STATUTORY AND REGULATORY PROVISIONS INVOLVED*

United States Arbitration Act

Section 2, 9 U.S.C. § 2
Section 3, 9 U.S.C. § 3

Securities Act of 1933

Section 12(2), 15 U.S.C. § 77 l (2)
Section 14, 15 U.S.C. § 77n

Securities Exchange Act of 1934

Section 10(b), 15 U.S.C. § 78j(b)
Section 29(a), 15 U.S.C. § 78cc(a)

Racketeer Influenced and Corrupt Organizations Act

Section 1962, 18 U.S.C. § 1962
Section 1964(c), 18 U.S.C. § 1964(c)

Securities and Exchange Commission Regulation

Rule 10b-5, 17 C.F.R. § 240.10b-5

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* The text of these provisions is reproduced in full at Appendix A hereto.

No.

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OCTOBER TERM, 1986

SHEARSON/AMERICAN EXPRESS INC. and
MARY ANN MCNULTY,

Petitioners,

v.

EUGENE MCMAHON, JULIA MCMAHON, individually and as trustees of THE DAVID J. HODDER & SON, INC. EMPLOYEE PENSION PLAN; THE DAVID J. HODDER & SON, INC. PROFIT SHARING PLAN; THE LAURIE FUNERAL HOME, INC. EMPLOYEE PENSION PLAN; and THE LAURIE FUNERAL HOME PROFIT SHARING PLAN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners Shearson Lehman Brothers Inc., successor to Shearson/American Express Inc. ("Shearson"), and Mary Ann McNulty, defendants below, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered on April 16, 1986, which affirmed in part and reversed in part an order of the United States

District Court for the Southern District of New York. The District Court enforced in part a pre-existing agreement between Shearson and plaintiffs, who were customers of Shearson, to arbitrate all disputes arising out of their customer-broker relationship. The District Court ordered arbitration of both the common law claims and the claims under § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78a, *et seq.* (1982) (the "Exchange Act"), but refused to enforce the agreement with respect to plaintiffs' claims under § 1964(c) of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, *et seq.* ("RICO").

On appeal, the Second Circuit ruled that district courts within its jurisdiction are barred from enforcing agreements to arbitrate claims arising under either § 10(b) or the RICO statute. The Second Circuit held that *Wilko v. Swan*, 346 U.S. 427 (1953), and its own precedents compelled this result. *See, e.g., Allegaert v. Perot*, 548 F.2d 432 (2d Cir.), *cert. denied*, 432 U.S. 910 (1977); *American Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821 (2d Cir. 1968).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 788 F.2d 94, and is reproduced at Appendix B hereto. The opinion of the United States District Court for the Southern District of New York is reported at 618 F. Supp. 384, and is reproduced at Appendix C hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on April 16, 1986. A copy of the judgment is reproduced at Appendix D hereto. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) (1982).

STATEMENT OF THE CASE

From February 1980 through July 1982, respondents Eugene and Julia McMahon, either individually, jointly, or on behalf of various trusts, signed a series of Customer Agreements with a predecessor of Shearson, a brokerage firm. Each of these agreements provided for arbitration of any controversy relating to the various accounts. A typical agreement provided in part:

> Unless unenforceable due to federal or state law, any controversy arising out of or relating to my accounts, to transactions with you for me or to this agreement or the breach thereof, shall be settled by arbitration in accordance with the rules, then in effect, of the National Association of Securities Dealers, Inc. or the Boards of Directors of the New York Stock Exchange, Inc. and/or the American Stock Exchange, Inc. as I [the customer] may elect.

On October 26, 1984, respondents sued Shearson and Mary Ann McNulty, the registered representative who handled their accounts, in the United States District Court for the Southern District of New York. Respondents claimed that there had been excessive trading in their accounts, and that certain securities purchased for those accounts were not appropriate for their particular investment objectives. They alleged that the defendants' conduct constituted: (a) common law fraud, (b) a breach of fiduciary duty, (c) a violation of § 10(b) of the Exchange Act and Rule 10b-5 thereunder, and (d) a violation of § 1962 of the RICO statute. These claims all arose out of the same set of allegations, which complained about the manner in which the plaintiffs' securities accounts were handled.

Shearson and Ms. McNulty moved for an order to enforce the arbitration agreement pursuant to § 3 of the United States Arbitration Act, 9 U.S.C. § 1, *et seq.* (the "Arbitration Act"). The District Court, Hon. Lloyd F. MacMahon, adopted the reasoning of Justice White's concurring opinion in *Dean Witter*

Reynolds, Inc. v. Byrd, 105 S. Ct. 1238, 1244 (1985), and enforced the agreement to arbitrate the § 10(b) claims, as well as the common law claims. *McMahon*, 618 F. Supp. at 388. The District court ruled, however, that it was barred from enforcing the agreement to arbitrate respondents' RICO claims. *Id.* at 389. The Court then placed the RICO claims on the suspense docket pending the arbitration of the other claims.

Respondents appealed the District Court's order enforcing the agreement to arbitrate the § 10(b) claims, pursuant to 28 U.S.C. § 1292(a)(1). Petitioners cross-appealed the denial of their motion to arbitrate the RICO claims.

The Second Circuit ruled that district courts within its jurisdiction may not enforce arbitration agreements insofar as they apply to (a) claims under § 10(b) of the Exchange Act, or (b) civil RICO claims.

REASONS FOR GRANTING THE WRIT

The Second Circuit's decision forbidding the enforcement of agreements to arbitrate claims under § 10(b) of the Exchange Act is in direct conflict with the decision of the Eighth Circuit Court of Appeals in *Phillips v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 85-5156 (8th Cir. July 9, 1986), which enforced an agreement to arbitrate § 10(b) claims. As the Eighth Circuit recognized, the conflict is clear and direct:

> Finally, we observe that the federal appellate courts, in the absence of precedent in their own circuit, tend to rely on precedent in other circuits. Ordinarily, then, in deciding a case of this kind, we would defer to the opinion of another circuit, such as rendered by the Second Circuit in *McMahon*, and avoid creating a conflict within the circuits. We believe, however, that the Supreme Court's opinions in *Scherk* and *Byrd* have invited a reexamination of the applicability of *Wilko* to claims arising under section 10(b) of the 1934 Act and Rule 10b-5. Because we are not bound by the precedents of other circuits, we are free to make a new

> assessment of this issue. We have made that assessment, and now create a conflict within the circuits. We assume the Supreme Court will eventually decide this question.

Phillips, slip op. at 14.

The Second Circuit's decision also conflicts with recent decisions of this Court and with the clear mandate of Congress in the Arbitration Act, which direct that all doubts are to be resolved in favor of arbitration. The Second Circuit allowed its distrust of arbitration to override Congressional intent and prevent arbitration of § 10(b) and civil RICO claims.

This Court will eventually have to decide the arbitrability of § 10(b) and civil RICO claims, and we respectfully suggest that it should do so now. The lower courts are burdened, on an almost daily basis, with motions to compel arbitration of such claims. Many of these courts are compelled by circuit court precedent to prohibit enforcement of arbitration agreements and to hear the resulting lawsuits. Others, relying upon recent decisions of this Court, have considered the issues to be open and have concluded that § 10(b) and RICO claims are arbitrable.[1]

Until this issue is resolved, parties to arbitration agreements will continue to be deprived of an efficient, expeditious, and less expensive alternative to federal courts for settling their disputes, while each passing day will clog the courts with more motions raising this issue, and with more lawsuits asserting claims that should be determined through arbitration.

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[1] Petitioners are aware of 118 cases nationwide that have decided the enforceability of agreements to arbitrate § 10(b) claims since *Byrd* was decided. 76 decisions, or approximately 64%, have held that § 10(b) claims must be arbitrated, while 42 decisions, or approximately 36%, have held that § 10(b) claims may not be arbitrated. One additional case stayed its decision pending the outcome of *Phillips*. A complete list of the district court decisions on this issue appears at Appendix E to this petition. *See also* Appendix F (listing 47 district court cases addressing the arbitrability of civil RICO claims).

I. This Court Should Grant Certiorari to Resolve the Conflict Among the Circuits As to Whether Congress Intended to Prohibit the Enforcement of Agreements to Arbitrate Claims Arising Under § 10(b) of the Exchange Act

The Eighth Circuit in *Phillips* was fully aware of the Second Circuit's decision in *McMahon*, and explicitly disagreed with it. The result is a direct "conflict within the Circuits." *Phillips*, slip op. at 14. This fundamental conflict between two circuit courts of appeals, both reviewing the same legal arguments, is mirrored by the conflict among the district courts on this issue. *See* n.1, *supra*.

With the force of the Eighth Circuit's reasoning as support, there can be no doubt that more district courts will be faced with motions to compel arbitration.[2] This enormous consumption of judicial time and resources will continue until this Court decides the issue.

A. The Second and Eighth Circuit Courts of Appeals are In Direct Conflict As to Whether the *Wilko v. Swan* Exception to the Arbitration Act for Claims Under § 12(2) Of the Securities Act of 1933 Should Be Extended to Claims Under § 10(b) of the Exchange Act

Congress did not create a private remedy for violations of § 10(b) of the Exchange Act. Instead, a judicially-implied private right of action evolved over the years. *See Herman & MacLean v. Huddleston*, 459 U.S. 375, 380 (1983). Plaintiffs in securities actions now routinely claim violations of § 10(b), usually on the basis of the same facts alleged to support a claim of common law fraud. Common law fraud claims, of course, are arbitrable even if they are based upon the same allegations as federal securities law claims. *Byrd*, 105 S. Ct. at 1241. Whether § 10(b)

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[2] Motions to compel arbitration will continue to be made even in those circuits where such agreements are not enforceable, in order to prevent a later claim of waiver should this Court determine otherwise. *See, e.g., Price v. Drexel Burnham Lambert, Inc.*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 92,790 at 93,884 (5th Cir. June 11, 1986) (failure to move for arbitration of state law claims, although pre-*Byrd*, nevertheless waived right to arbitration).

claims can be arbitrated, however, is a question that has split the district and circuit courts.

The arguments on both sides of this issue have been fully developed over the years, in decisions from this Court, from the circuit courts of appeals, and from numerous district courts. Further consideration by the lower courts will create conflict, not clarification.

1. **The Second Circuit's decision in this case rests upon its own precedent extending *Wilko v. Swan* to § 10(b) claims, and its own view of public policy, rather than any analysis of Congressional intent**

The Second Circuit gave two reasons for precluding enforcement of agreements to arbitrate § 10(b) claims: prior Second Circuit precedent extending *Wilko v. Swan*, 346 U.S. 427 (1953) to § 10(b) claims[3] and the Second Circuit's view, based upon a fundamental distrust of arbitration, that "public policy" mandates resolution of these issues in a judicial forum. *McMahon*, 788 F.2d at 97.

In *Wilko*, this Court determined that the "non-waiver" provision of the Securities Act of 1933, 15 U.S.C. § 77a, *et seq.* (1982) (the "1933 Act"), when coupled with the explicit and unique procedural and substantive rights granted under § 12(2) of that Act, barred enforcement of an agreement to arbitrate that explicitly-created remedy. The *Wilko* Court held that the right to select a judicial forum was a "provision" of the 1933 Act, and thus subject to § 14 of the 1933 Act, 15 U.S.C. § 77n (1982), which voids any "stipulation" waiving compliance with any "provision" of that Act. *Wilko*, 346 U.S. at 434-35.

The reasoning of *Wilko* was thus limited to the specific language of the 1933 Act, and in particular to the express statutory remedy in § 12(2). As this Court has recently reconfirmed, the

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[3] *See AFP Imaging Corp. v. Ross*, 780 F.2d 202, 205 (2d Cir. 1985), *cert. denied*, (United States June 30, 1986); *Allegaert*, 548 F.2d at 436-38 (1977); *Greater Continental Corp. v. Schechter*, 422 F.2d 1100, 1103 (2d Cir. 1970); *Colonial Realty Corp. v. Bache & Co.*, 358 F.2d 178, 183 n.5 (2d Cir.), *cert. denied* 385 U.S. 817 (1966).

1933 Act and the Exchange Act should not necessarily be construed *in pari materia*, but should be analyzed separately according to the language and purpose of each statute. *Randall v. Loftsgaarden*, No. 85-519 (United States July 2, 1986).

Nevertheless, several circuit courts of appeals, prior to this Court's decision in *Byrd*, extended *Wilko* to bar arbitration of § 10(b) claims.[4] Even those courts that extended *Wilko* to § 10(b) claims did not forbid the arbitration of all securities law claims, however, *Wilko* does not apply to disputes between members of the securities exchanges or the National Association of Securities Dealers, Inc., who are subject to rules mandating arbitration. *See, e.g., Halliburton & Assocs.*, 774 F.2d at 444-45; *Coenen v. R.W. Pressprich & Co.*, 453 F.2d 1209, 1212 (2d Cir.), *cert. denied*, 406 U.S. 949 (1972). Nor does *Wilko* apply where arbitration is selected *after* the dispute has arisen. *See, e.g., Coenen*, 453 F.2d at 1213; *Gardner v. Shearson, Hammill & Co.*, 433 F.2d 367, 368 (5th Cir. 1970) (per curiam), *cert. denied*, 401 U.S. 978 (1971).

To the extent that the Second Circuit's decision is based on a "public policy" that § 10(b) claims must be resolved in a judicial forum, it reflects a judicial distrust of arbitration that this Court has expressly rejected. As this Court commented in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 105 S. Ct. 3346 (1985):

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[4] *See Surman v. Merrill Lynch, Pierce, Fenner & Smith*, 733 F.2d 59, 61-62 (8th Cir. 1984); *Belke v. Merrill Lynch, Pierce, Fenner & Smith*, 693 F.2d 1023, 1025-26 (11th Cir. 1982); *De Lancie v. Birr, Wilson & Co.*, 648 F.2d 1255, 1258-59 (9th Cir. 1981); *Mansbach v. Prescott, Ball & Turben*, 598 F.2d 1017, 1030 (6th Cir. 1979); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Moore*, 590 F.2d 823, 827-29 (10th Cir. 1978); *Weissbuch v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 558 F.2d 831, 833-35 (7th Cir. 1977); *Allegaert*, 548 F.2d at 436-38 (1977); *Sibley v. Tandy Corp.*, 543 F.2d 540, 543 (5th Cir. 1976), *cert. denied*, 434 U.S. 824 (1977); *Ayres v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 538 F.2d 532, 53[illegible] (3rd Cir.), *cert. denied*, 429 U.S. 1010 (1976).

> [W]e are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution.

Id. at 3354.

Indeed, the securities industry, in conjunction with the Securities and Exchange Commission ("SEC") and other interested parties, has developed and established procedures for arbitrating securities law claims that provide protection to the public and to the policies underlying the securities laws.[5] Contrary to any concern that may have been expressed by the courts about the ability of arbitrators to resolve securities law claims fairly and competently, the historical evidence demonstrates that arbitration governed by these procedures effectively carries out the public policies underlying the securities laws. *See* C. Katsoris, *The Arbitration of a Public Securities Dispute*, 53 Fordham L. Rev. 279 (1984).

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[5] Arbitration is a structured forum subject to a clear set of rules. *See, e.g.*, Constitution of the New York Stock Exchange, Inc., Art. VIII, 2 N.Y.S.E. Guide (CCH) ¶¶ 1351-1357; Arbitration Rules 600-634 of the New York Stock Exchange, Inc., 2 N.Y.S.E. Guide (CCH) at ¶¶ 2600-2634. *See generally*, Uniform Code of Arbitration, N.A.S.D. Manual (CCH) ¶¶ 3712-3743. These rules have been expressly approved by the SEC, which has found them to be in the public interest and in furtherance of just and equitable principles of trade. *See* SEC Securities Exchange Act Release No. 16390 (Nov. 30, 1979), 18 S.E.C. Docket 1197 (1979).

The SEC, moreover, retains jurisdiction to correct any perceived abuses or unfairness in the arbitration rules, pursuant to § 19 of the Exchange Act, 15 U.S.C. § 78s (1982). Furthermore, arbitrators are bound to follow the law in adjudicating § 10(b) claims. *Wilko*, 346 U.S. at 436 (1953). Manifest disregard of the law is one ground to vacate an arbitration award. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 92,781 (S.D.N.Y. June 14, 1986) (Weinfeld, J.) (manifest disregard of law under Rule 10b-4 required arbitrators' award to be vacated). *See also Swift Indus., Inc. v. Botany Indus., Inc.*, 466 F.2d 1125, 1130-31 (3d Cir. 1972); *San Martine Compania de Navegacion v. Saguenay Terminals, Ltd.*, 293 F.2d 796, 801 (9th Cir. 1961).

2. The Eighth Circuit's decision in *Phillips* rests upon this Court's recent pronouncements questioning the applicability of *Wilko v. Swan* to § 10(b) claims and the explicit Congressional mandate favoring arbitration

The Eighth Circuit, unlike the Second Circuit, recognized that this Court in recent years has consistently reaffirmed the strong national policy favoring arbitration. *Phillips*, slip op. at 4. As the *Phillips* court noted, this Court's decision in *Wilko* remains a carefully-limited decision, based upon the special characteristics of the statutorily-created cause of action under § 12(2) of the 1933 Act.

This Court has twice commented that *Wilko* does not control the question of the arbitrability of claims under § 10(b) of the Exchange Act. In *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974), this Court enforced an agreement to arbitrate disputes involving § 10(b) claims in an international context, stating:

> At the outset, a colorable argument could be made that even the semantic reasoning of the *Wilko* opinion does not control the case before us. *Wilko* concerned a suit brought under § 12(2) of the Securities Act of 1933, which provides a defrauded purchaser with the "special right" of a private remedy for civil liability, 346 U.S. at 431. There is no statutory counterpart of § 12(2) in the Securities Exchange Act of 1934, and *neither § 10(b) of that Act nor Rule 10b-5 speaks of a private remedy to redress violations of the kind alleged here.* While federal case law has established that § 10(b) and Rule 10b-5 create an implied private cause of action, the Act itself does not establish the "special right" that the Court in *Wilko* found significant. Furthermore, while both the Securities Act of 1933 and the Securities Exchange Act of 1934 contain sections barring waiver of compliance with any "provision" of the respective Acts, certain of the "provisions" of the 1933 Act that the Court held could not be waived by Wilko's agreement to arbitrate find no counterpart in the 1934 Act.

Scherk, 417 U.S. at 513-14 (citations and footnote omitted) (emphasis added).

In *Byrd*, this Court noted the doubts expressed in *Scherk* about the applicability of *Wilko* to § 10(b) claims. It did not decide the issue, however, as the defendant had not sought to compel arbitration of the § 10(b) claim in the district court. *Byrd*, 105 S. Ct. at 1240 n.1.

Justice White, in his concurring opinion in *Byrd*, discussed the reasoning of *Wilko* and its inapplicability to claims under § 10(b) of the Exchange Act. He observed that the validity of the conclusion that § 10(b) claims are not arbitrable "is a matter of substantial doubt." *Id.* at 1244. He stated that "*Wilko*'s reasoning cannot be mechanically transplanted to the 1934 Act," because a private agreement to arbitrate an implied cause of action cannot constitute a waiver of a "provision" of the Exchange Act where the Act makes no provision for a private right of action. *Id.* Given that a private right of action under § 10(b) has been judicially implied, rather than Congressionally mandated, the non-waiver provision of the Exchange Act, § 29(a), 15 U.S.C. § 78cc(a), "is thus literally inapplicable." *Id.* at 1244. Moreover, the virtual identity of § 10(b) claims and claims sounding in common law fraud, which are clearly arbitrable, argues against any special exception to the Arbitration Act for § 10(b) claims. *Id.* at 1244.

The Eighth Circuit analyzed this question in light of Justice White's concurring opinion in *Byrd* and this Court's recent reaffirmation of the strong national policy favoring arbitration. The *Phillips* court noted that, unlike common law claims for fraud or deceit, § 12(2) requires defendants to prove lack of due care. By contrast, § 10(b) requires plaintiffs to prove *scienter*, as in common law fraud. The Eighth Circuit also noted the significant differences in the jurisdictional provisions of the two statutes. *Phillips*, slip op. at 9-10.

After careful analysis, the Eighth Circuit concluded:

> Based on these differences between the 1933 and 1934 Acts, and on the strong federal policy favoring enforcement of arbitration agreements, we conclude that *Wilko*'s holding and rationale does not extend to claims arising under section 10(b) of the 1934 Act and Rule 10b-5. The non-waiver provision of the 1934 Act, section 29(a), simply does not override the Arbitration Act in the same manner as section 14 of the 1933 Act when it is not buttressed by special rights and broad jurisdictional provisions similar to those found in the 1933 Act. . . . We hold, then, that Congress has not evinced an intention to preclude the waiver of judicial remedies for the section 10(b) and Rule 10b-5 rights at issue here.

Phillips, slip op. at 10 (footnotes omitted).

A second basis for the Second Circuit's decision was its belief that "public policy" requires that § 10(b) claims be heard in federal court. The Eighth Circuit, however, rejected that argument, noting:

> As support for its contention that 1934 Act claims are not arbitrable, Phillips argues that arbitration is less effective than adjudication in enforcing a plaintiff's rights under the 1934 Act. We believe that this argument, if it has any validity, is largely beside the point. Congress, through the Arbitration Act, as well as the Supreme Court have expressed increased approval for the use of arbitration rather than adjudication. . . . The question here is whether Congress has created an exception to the mandate of the Arbitration Act for a plaintiff's judicially implied section 10(b) and Rule 10b-5 rights. We conclude that it has not.

Phillips, slip op. at 10 n.16.

The conflict between the Second and Eighth Circuits is clear and direct. Did Congress intend to create an exception to the Arbitration Act for implied claims under § 10(b)? Can the courts, based on their own views of public policy, decide that some issues

are simply too important to be entrusted to arbitrators? The Second Circuit held that the *Wilko* exception to the Arbitration Act applies to § 10(b) claims, and that "public policy" mandates resolution of these issues in a judicial forum. The Eighth Circuit is squarely opposed to the Second Circuit on both points. Only this Court can resolve the conflict.

3. The Second Circuit's decision conflicts with the clear intent of Congress and with this Court's recent decisions

The Second Circuit's mistrust of arbitration directly conflicts with the Congressional policy codified in the Arbitration Act, in effect since 1925, and with recent decisions of this Court.

The Arbitration Act states in relevant part:

> A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof . . . *shall be valid, irrevocable, and enforceable*, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (1982) (emphasis added). Congress intended the Arbitration Act to reverse the courts' general hostility towards arbitration agreements and to expressly state the strong public policy in favor of enforcing such agreements. *Mitsubishi*, 105 S. Ct. at 3353-54 & n.14; *Byrd*, 105 S. Ct. at 1241-43; *Southland Corp. v. Keating*, 465 U.S. 1, 10-16 (1984); *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *Scherk*, 417 U.S. at 510-11. This Court has recognized that the effect of § 2 of the Act was to "create a body of federal substantive law of arbitrability," and that "the Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. . ." *Moses H. Cone Memorial Hosp.*, 460 U.S. at 24-25; *see also Southland Corp.*, 465 U.S. at 10-16.

In *Mitsubishi*, this Court, citing Justice White's concurring opinion in the *Byrd* case, stated that courts must enforce the federal policy favoring arbitration manifested in the Arbitration Act, absent a clear Congressional intent to create an exception. *Id.* at 3355. Employing that standard, this Court held that an agreement to arbitrate disputes arising out of an international business relationship was enforceable even as to antitrust claims under the Sherman Act, 15 U.S.C. § 1, *et seq.* (1982). *Id.* at 3361.

This Court observed that, despite the importance of antitrust claims, there was no reason not to enforce an international agreement to arbitrate such claims:

> *By agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute*; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration. We must assume that *if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history.* Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.

Mitsubishi, 105 S. Ct. at 3355 (citation omitted) (emphasis added); *see also United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 584-85 (1960) (absent "any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail").[6]

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[6] Even the dissent in *Mitsubishi*, which viewed special, statutorily-created rights as potentially exempt from the Arbitration Act, noted that § 10(b) claims that essentially parallel contract and fraud claims may be arbitrated. *Mitsubishi*, 105 S. Ct. at 3364 (citing *Scherk*, 417 U.S. 506).

Mitsubishi thus teaches that even express statutory claims are arbitrable absent explicit Congressional intent to the contrary. The Second Circuit's decision in this action stands *Mitsubishi*'s analysis on its head. By refusing to enforce an agreement to arbitrate an implied right of action, the Second Circuit gave greater weight to its own view of the importance of a judicial forum for an implied cause of action than it gave to the explicit Congressional mandate – codified in the Arbitration Act – that arbitration agreements should be enforced.

4. The conflict among the circuits can only be resolved by this Court

The decision in *Phillips*, although clearly reasoned, does not develop any new points. Rather, it states in succinct form the arguments first raised by this Court in *Scherk*, which were further developed by Justice White in his concurring opinion in *Byrd*, and which were then fully developed in the intense litigation and numerous decisions of the past year. The question of the arbitrability of § 10(b) claims will not benefit from further development in the lower courts.

Although the arguments are clear-cut, the circuits are sharply divided on which arguments are correct. Since this Court's decision in *Byrd*, the Fifth and Eleventh Circuits, in addition to the Second Circuit, have precluded the district courts within their jurisdictions from enforcing agreements to arbitrate § 10(b) claims. In *Miller v. Drexel Burnham Lambert, Inc.*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 92,783 (11th Cir. June 17, 1986) (per curiam), the Eleventh Circuit, without analyzing the effect of *Mitsubishi* or Justice White's concurrence in *Byrd*, held that because this Court in *Byrd* did not expressly overrule Eleventh Circuit precedent extending *Wilko v. Swan* to § 10(b) claims, it was obliged to follow its own precedent.[7]

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[7] The continuing validity of *Miller* is in doubt, however, as the Eleventh Circuit is now reconsidering this issue *en banc*. *Gorman v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 609 F. Supp. 1054 (S.D. Fla.), *aff'd*, 780 F.2d 1032 (11th Cir. 1985) (*en banc* consideration granted Oct. 3, 1985).

The Fifth Circuit in *King v. Drexel Burnham Lambert, Inc.*, No. 85-1717 (5th Cir. May 28, 1986), affirmed a district court decision reaching the same conclusion. Already, other cases expressly raising the enforceability of agreements between brokers and their customers to arbitrate § 10(b) claims are now on appeal before the Third, Fourth, Sixth, Seventh, Ninth and Eleventh Circuits. *See* Appendix E. Given the clear-cut nature of the arguments, decisions on these appeals will only increase the conflicts among the circuits.

B. The Continued Conflict and Confusion Among the Lower Courts Over the Applicability of *Wilko v. Swan* to § 10(b) Claims Requires Early Resolution in Order to Avoid Increased Congestion in the Lower Courts

As long as the arbitrability of § 10(b) claims remains unclear, the issue will be the subject of motions and appeals consuming inordinate amounts of judicial resources. In the brief period since *Byrd* was decided, at least 118 decisions have dealt with this issue. *See* Appendix E. More are being reported every week.

In addition to the motions currently pending in already-filed cases, each week brings new filings of securities-related claims. Statistics compiled by the Administrative Office of the United States Courts reveal that during the twelve months ended March 31, 1986 a total of 3,064 "Securities, Commodities and Exchanges" private civil actions were filed in federal district courts.[8] This flood of private securities lawsuits, many raising claims subject to arbitration agreements, will continue to force the district courts to decide the enforceability of such agreements and, perhaps, to decide claims that the parties had agreed should be arbitrated.

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[8] *See* Federal Judicial Workload Statistics, Table C-2 at 13 (March 1986). In the year ended June 30, 1985, 3,072 such cases were filed. *See* Annual Report of the Director of the Administrative Office of the United States Courts, Table C-2 at 283 (1985). This represents a 40% increase over comparable figures for 1982. *See* Annual Report of the Director of the Administrative Office of the United States Courts, Table C-2 at 217 (1982).

The burden on the district courts of leaving this issue unresolved is not limited to deciding numerous motions to compel. When the courts within the Second, Fifth and Eleventh Circuits are added to the substantial number of courts that may choose to follow such precedent,[9] it becomes clear that, unless this Court acts, a significant number of otherwise arbitrable disputes will be tried in already overcrowded federal district courts.[10]

The Arbitration Act reflects a strong Congressional policy in favor of reducing congestion in our federal courts. Such congestion is one of the most serious problems facing the federal judiciary today.[11] When parties agree that a claim should be resolved out of court, only explicit Congressional intent should override that decision and require the expenditure of the time and resources required by a federal lawsuit. In this case, neither Congressional intent nor the language of the Exchange Act requires such a waste of time and judicial resources.[12]

(footnote continued)

[9] The *McMahon* decision, although less persuasively reasoned than *Phillips*, will undoubtedly carry significant weight because of the Second Circuit's acknowledged expertise and influence in securities law issues. *See Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 762 (1975) (Blackmun, J., dissenting) (referring to the Second Circuit as the "Mother Court" in securities law).

[10] In the year prior to the Second Circuit's decision in this case, the district courts of New York addressed the arbitrability of claims under the Exchange Act in 12 decisions, 9 of which held such claims to be arbitrable. In the three months since the Second Circuit's decision in this case, 10 more cases in the New York district courts have addressed this issue and have adhered to the Second Circuit's decision. A full list of these cases can be found in Appendix E to this petition.

[11] Speech by Chief Justice Warren E. Burger to the American Arbitration Association and the Minnesota Bar Association, on August 21, 1985, reported by UPI on the same date; Speech by Chief Justice Warren E. Burger at New York University on November 18, 1982, reported in the Christian Science Monitor on November 24, 1982.

[12] A finding that § 10(b) claims are arbitrable will also eliminate another source of waste – the maintenance of duplicative proceedings in separate forums. As a result of this Court's decision in *Byrd*, federal courts are required to compel arbitration of state law claims. *See Byrd*, 105 S. Ct. at 1241. If at the same

(footnote continued)

Petitioners respectfully submit that this Court should grant certiorari and resolve the conflict among the circuits by reversing the Second Circuit's decision barring the enforcement of agreements to arbitrate § 10(b) claims.

II. This Court Should Grant Certiorari to Decide Whether, In Enacting the RICO Statute, Congress Intended to Exempt All Civil RICO Claims From the Coverage of the Arbitration Act

Congress enacted RICO principally to combat the infiltration of legitimate business by organized crime. *United States v. Turkette*, 452 U.S. 576, 591 (1981). In the years since its passage, however, the private cause of action under RICO has been "evolving into something quite different from the original conception of its enactors." *Sedima, S.P.R.L. v. Imrex Co.*, 105 S. Ct. 3275, 3287 (1985). "Racketeering" is becoming a basic claim in commercial disputes; ordinary customer complaints about their securities brokers are now RICO claims.[13] As the Seventh Circuit has observed, Congress inadvertently "may well have created a runaway treble damage bonanza for the already excessively litigious." *Schacht v. Brown*, 711 F.2d 1343, 1361 (7th Cir.), *cert. denied*, 464 U.S. 1002 (1983).

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time courts are required to hear federal claims based on the same facts, parallel – and most likely duplicative – proceedings will result. *See Shotto v. Laub*, 632 F. Supp. 516, 523 & n.10, 529 (D. Md. 1986); *Steinberg v. The Illinois Co.*, No. 85-C-7131 (N.D. Ill. May 15, 1986); *Austad v. Drexel Burnham Lambert, Inc.*, No. 85-C-9759 (N.D. Ill. Mar. 27, 1986).

[13] "RICO claims are now added as a matter of course in virtually all cases challenging securities transactions." American Institute of Certified Public Accountants, "The Authority to Bring Private Treble-Damage Suits Under 'RICO' Should Be Reformed," *AICPA White Paper On Civil RICO* at 2 (July 31, 1985), *reprinted in* Oversight on Civil RICO Suits: Hearings on Oversight on Civil RICO Suits Brought Under 18 U.S.C. 1964(c) Before the Senate Committee on the Judiciary, 99th Cong., 1st Sess. 251, 255 (1985) (hereinafter cited as "*AICPA White Paper*").

Indeed, despite the Second Circuit's belief that the policies underlying RICO are too important to be left to arbitrators, the arbitration of civil RICO claims arising out of normal commercial relationships would have no effect on the types of claims RICO was meant to address: criminal actions, civil proceedings by the federal government pursuant to 18 U.S.C. § 1964(b), or lawsuits by private plaintiffs against mobsters attempting to infiltrate their businesses.[14] *See Ross v. Mathis*, 624 F. Supp. 110, 117 n.6 (N.D. Ga. 1985). This petition addresses the validity of agreements between parties to legitimate business transactions who have previously agreed to arbitrate any disputes. There is thus no reason, either in public policy or Congressional intent, for district courts – rather than arbitrators – to be burdened with hearing these claims simply because a plaintiff has labelled them "racketeering."

The enforceability of agreements to arbitrate such claims is an open question, and the Second Circuit's decision in this case insures that it will stay unresolved. The strong trend of district court decisions since *Mitsubishi* was to direct arbitration of civil RICO claims.[15] However, those courts bound by the Second Circuit's decision, or which choose to follow it, will now find themselves in conflict with that trend. As the growing tide of RICO cases washes over the district courts, the conflict and confusion among the courts on this issue will only increase. In order to resolve this conflict at an early stage, and to avoid the unnecessary burden on district courts that will result from the

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[14] Unfortunately, as the New York City Bar Association reported, "[c]ivil RICO has done literally nothing to advance Congress' goal of providing for 'an assault on organized crime and its economic roots.' This is hardly surprising: litigious though our society is, few would expect those injured in their businesses by the activities of 'the archetypal, intimidating mobster[s]' to serve summonses and complaints on such defendants." Committee on Federal Legislation, "Reform of the Private Civil Action Provision of RICO," 41 *The Record of the Association of the Bar of the City of New York* 412, 416 (May 1986) (footnotes omitted). Even rarer than a civil action against a member of organized crime would be a dispute between a mobster and a victim that was subject to an arbitration agreement.

[15] Appendix F to this petition lists 47 district court decisions that have addressed the enforceability of agreements to arbitrate civil RICO claims.

Second Circuit's *per se* rule that RICO claims can never be arbitrated, no matter how mundane the underlying dispute, this Court should grant certiorari to decide the question.

A. The Enforceability of Agreements to Arbitrate Civil RICO Claims is An Unresolved and Important Question of Federal Law, and the Second Circuit's Decision Will Only Increase the Conflict Among the District Courts on This Issue

This Court has never decided whether agreements to arbitrate civil RICO claims are enforceable. The Second Circuit is the only circuit court of appeals to have decided the issue, but four other cases raising the issue are now pending before the Third, Fifth, Seventh and Eighth Circuits.[16] In addition, the Fifth Circuit, although initially ruling that civil RICO claims are not arbitrable, upon reconsideration recently remanded the case to the district court, noting that this Court's decision in *Mitsubishi* may require the enforcement of agreements to arbitrate RICO claims. *Smoky Greenhaw Cotton Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 92,767 at 93,755 (5th Cir. May 13, 1986) (per curiam).

The issue has been intensely litigated in the district courts. At least 28 decisions have held that civil RICO claims are arbitrable, while 19 decisions, many prior to *Mitsubishi*, have held that they are not. *See* Appendix F.

Prior to the Second Circuit's decision in this matter, the conflict appeared to be headed toward resolution. District courts were deciding in favor of arbitration based upon this Court's decision in *Mitsubishi*. In *Mitsubishi*, this Court corrected the mistaken

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[16] *See Jacobson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,276 (W.D. Pa. Apr. 19, 1985) (RICO claims are arbitrable) (appeal pending); *Russell v. Shearson Lehman Bros., Inc.*, No. CA3-85-2335-R (N.D. Tex. Mar. 10, 1986) (RICO claims are arbitrable) (appeal pending); *American Concept v. Irsay*, No. 84 C 10026 (N.D. Ill. Oct. 4, 1985) (RICO claims are not arbitrable) (appeal pending); *Webb v. R. Rowland & Co.*, 613 F. Supp. 1123 (E.D. Mo. 1985) (RICO claims are not arbitrable) (appeal pending).

assumption held by many district courts that antitrust claims could never be arbitrated. As this Court made clear, the dispositive question is whether Congress intended to exempt a particular claim from the requirements of the Arbitration Act. 105 S. Ct. at 3355.

Several of the district court decisions holding that RICO claims are not arbitrable were decided before *Mitsubishi*, and thus were based upon the assumption that antitrust claims could never be arbitrated. Analogizing RICO claims to antitrust claims, those courts concluded that RICO claims also could not be arbitrated.[17] The clear majority of the 39 district court cases deciding this issue since *Mitsubishi*, however, enforced agreements to arbitrate civil RICO claims. *See* Appendix F.

As noted above, this Court's decision in *Mitsubishi* had a similar effect in the Fifth Circuit. In *Smoky Greenhaw*, 785 F.2d 1274 (5th Cir. 1986), the Fifth Circuit initially ruled that civil RICO claims are not arbitrable. Upon reconsideration, however, it withdrew that portion of its decision, stating:

> Although *Mitsubishi* arose in an international antitrust dispute and its holding purports to be limited to that context, we believe that its broad language may carry significance for domestic disputes as well. The parties in this case should have the opportunity to argue the applicability of *Mitsubishi* to domestic RICO claims before the District Court. We therefore amend our opinion to refuse to decide the arbitrability *vel non* of the plaintiffs' RICO claim and, on remand, leave to the District Court the task of deciding that issue on the full briefing and argument of the parties.

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[17] The antitrust analogy formed the basis for the leading pre-*Mitsubishi* decision regarding civil RICO arbitrability. *See S.A. Mineracao da Trindade-Samitri v. Utah Int'l Inc.*, 576 F. Supp. 566, 575 (S.D.N.Y. 1983), *order certified for interlocutory appeal*, 579 F. Supp. 1049 (S.D.N.Y.), *appealed on other grounds and affirmed*, 745 F.2d 190 (2d Cir. 1984). Other pre-*Mitsubishi* decisions adopted the reasoning of that decision. *See Roes v. Paine, Webber, Jackson & Curtis, Inc.*, No. C84-2311A (N.D. Ga. Mar. 29, 1985); *Witt v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 602 F. Supp. 867, 870 (W.D. Pa. 1985); *Wilcox v. Ho-Wing Sit*, 586 F. Supp. 561, 567 (N.D. Cal. 1984); *Universal Marine Ins. Co. v. Beacon Ins. Co.*, 588 F. Supp. 735, 738 (W.D.N.C. 1984).

Smoky Greenhaw, Fed. Sec. L. Rep. ¶ 92,767 at 93,755.

It is thus likely that the district courts, applying the reasoning of *Mitsubishi* to the RICO claims actually being asserted, would have developed a consistent and reasoned jurisprudence on this issue. The Second Circuit, however, by issuing a *per se* rule that RICO claims can never be arbitrated, put an abrupt end to any such analysis in the district courts bound by its decision. Moreover, the decision could lead district courts outside the Second Circuit to adopt a similar *per se* rule barring arbitration of all RICO claims, regardless of the nature of the underlying dispute.

The importance to the federal judiciary of enforcing agreements to arbitrate civil RICO claims is demonstrated by the growing number of such claims being brought in the federal courts. As this Court has noted, the number of civil RICO actions has risen dramatically each year since the statute's passage. *Sedima*, 105 S. Ct. at 3277-78 & n.1.[18] According to the Administrative Office of the United States Courts, which compiles the annual Judicial Workload Statistics, a total of 474 civil RICO cases were filed in the district courts between December 1, 1985 and April 30, 1986.[19] As litigants become more comfortable with charging "racketeering" in commercial disputes, the number of RICO claims will only increase. Each day that goes by ensures that more courts will be required to adjudicate commercial disputes that—under any other name but RICO—would be submitted to an arbitrator.

The confusion and conflict concerning the enforceability of agreements to arbitrate civil RICO claims should be resolved by

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[18] As the Court noted in *Sedima* at 3277 n.1, according to the Report of the Ad Hoc Civil RICO Task Force, A.B.A. Section of Corp., Banking & Bus. Law at 55 (1985) (hereinafter cited as "*ABA Report*"), of the approximately 270 civil RICO trial court decisions between passage of the statute in 1970 and the end of 1984, 3% of the decisions were rendered in the decade of the 1970's and 43% in 1984.

[19] Communication from Elizabeth McGrath, Chief, Judicial Information Branch, Statistical Analysis and Reports Division, Administrative Office of the United States Courts, Washington, D.C., dated June 27, 1986.

this Court before the increasing volume of such claims threatens to overwhelm our court system. *See Dawson Chemical Co. v. Rohm & Haas Co.*, 448 U.S. 176, 185 (1980) (certiorari granted to forestall a possible conflict in the lower courts on an important issue); *Massachusetts Trustees v. United States*, 377 U.S. 235, 237 (1964) ("a considerable number of suits are pending in the lower courts which will turn on resolution of these issues"); *Comm'r v. Bilder*, 369 U.S. 499, 501 (1962) (citing "need for a uniform rule"); *see also New York v. Saper*, 336 U.S. 328, 329 (1949); *Shapiro v. United States*, 335 U.S. 1, 4 (1948).

B. The Second Circuit's Decision in This Case is in Direct Conflict With Congressional Intent, and Will Needlessly Burden the Courts and Litigants Unless it is Reviewed and Reversed

The Second Circuit erred in this action by failing to look to Congressional intent to determine whether RICO claims are arbitrable. Instead, the Court created its own exception to the Arbitration Act, based upon purported "policy considerations" that appear to have little to do with the types of RICO claims district courts actually face. In order to correct this mistaken decision and avoid the needless burden on the courts that will ensue, this Court should grant certiorari and reverse.

1. There is no evidence that Congress intended to create an exception to the Arbitration Act for all civil RICO claims

This Court stated in *Mitsubishi* that the strong national policy favoring arbitration requires the enforcement of agreements to arbitrate statutory claims unless Congress has expressed an intent to the contrary. *Mitsubishi*, 105 S. Ct. at 3355.[20] Nothing

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[20] Indeed, with respect to rights expressly created by statute, such a rule is mandated by principles of statutory construction. "The cardinal rule is that repeals by implication are not favored." *Posadas v. Nat. City Bank*, 296 U.S. 497, 503 (1936); *see United States v. Will*, 449 U.S. 200, 221 (1980). Absent a clear and manifest expression of intention by the legislature to repeal its prior enactment, a subsequent statute will be construed as consistent with a prior statute. *See Posadas*, 296 U.S. at 503; *see also Randall v. Loftsgaarden*, No. 85-519

(footnote continued)

in the language of the RICO statute, whether as originally enacted or subsequently amended, either expressly or impliedly prohibits the arbitration of private RICO claims.[21] Nor is there anything in the legislative history of RICO suggesting a Congressional intent to bar parties from agreeing to arbitrate RICO claims. *Bob Ladd, Inc. v. Adcock*, 633 F. Supp. 241, 243-44 (E.D. Ark. 1986); *Bale v. Dean Witter Reynolds, Inc.*, 627 F. Supp. 650, 654 (D. Minn. 1986); *Sacks v. Dean Witter Reynolds, Inc.*, [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,429 at 92,642 (C.D. Cal. Dec. 31, 1985); *Brener v. Becker Paribas Inc.*, 628 F. Supp. 442, 449-50 (S.D.N.Y. 1985).

The Second Circuit's decision in this action, however, contains no analysis of RICO's language or the statute's legislative history. Indeed, the Second Circuit did not conclude that Congress, in enacting RICO, intended to carve out an exception to the Arbitration Act. The Court chose instead to create a judicial exception to the Arbitration Act, concluding that undefined "public policy" considerations barred arbitration of RICO claims. *McMahon*, 788 F.2d at 98-99. In so doing, the Second Circuit relied upon its own decision in *American Safety*, in which it held that "the pervasive public interest in enforcement of the antitrust laws and the nature of the claims that arise in such cases, combine to make . . . antitrust claims . . . inappropriate for arbitration." *Id.* at 827-28.[22]

(United States July 2, 1986); *Washington v. Miller*, 235 U.S. 422, 428 (1914). Because it contains no clear expression of Congressional intention to create an exception to the Arbitration Act, the RICO statute, enacted in 1970, should be construed as consistent with the Arbitration Act, in force since 1925.

[21] Many of the courts that have held private RICO claims arbitrable have based their decisions, in whole or in part, upon the absence of a non-waiver provision in the RICO statute. *See Bale v. Dean Witter Reynolds, Inc.*, 627 F. Supp. 650, 654 (D. Minn. 1986); *Jacobson v. Merrill Lynch, Pierce, Fenner, & Smith, Inc.*, [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,276 at 91,899 (W.D. Pa. Apr. 19, 1985); *Ross v. Mathis*, 624 F. Supp. at 116-17 & n.6; *Brener v. Becker Paribas Inc.*, 628 F. Supp. 442, 450 (S.D.N.Y. 1985).

[22] To the extent that the Second Circuit's decision in this case is based upon the belief that arbitrators are unable to decide issues of fraud and complicated

(footnote continued)

In relying upon *American Safety*, the Second Circuit in this case failed to heed the mandate of *Mitsubishi*: that if Congress did not find public policy concerns sufficiently persuasive to create an exception to the Arbitration Act for the particular claim in question, then the Arbitration Act's strong public policy considerations must control. Indeed, this Court in *Mitsubishi* expressed skepticism over the validity of *American Safety* in any setting. *See Mitsubishi*, 105 S. Ct. at 3355-60. The Second Circuit's reliance upon *American Safety*'s obvious distrust of arbitration, rather than on any analysis of Congressional intent, thus requires reversal.

2. Civil RICO claims rarely implicate public policy, as they almost always involve simple commercial disputes

Even assuming, however, the continuing vitality of *American Safety*, its rationale is irrelevant to the arbitrability of most civil RICO claims. The vast majority of these claims do not involve public policy any more than do state law claims of fraud, which may be arbitrated. The district courts have come to recognize that "[t]he majority of civil RICO claims today do not impact on the general society or involve vital national interests. . . . " *Bale*, 627 F. Supp. at 654. Commercial disputes that otherwise would involve only claims of breach of contract, securities law violations, or fraud are now framed as RICO claims. *Haroco, Inc. v. American Nat. Bank and Trust Co.*, 747 F.2d 384, 386-87 (7th Cir. 1984), *aff'd*, 105 S. Ct. 3291 (1985) (per curiam); *see also The Supreme Court - Leading Cases*, 99 Harv. L. Rev. 120, 312-13 (1985) (the subject matter of private civil RICO actions is increasingly " 'ordinary' commerical fraud").

This lawsuit is typical of the RICO action today. The respondents' complaint alleges fraud based upon broker

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(footnote continued)

commercial disputes competently and fairly, the decision ignores the long experience of the securities industry in arbitrating the very types of claims that are asserted in RICO complaints. *See supra* at 9 and n.5 and C. Katsoris, *The Arbitration of a Public Securities Dispute*, 53 Fordham L. Rev. 279 (1984).

misrepresentations and "churning" in their accounts; the "racketeering" activity in respondents' RICO claims is nothing more than the alleged misrepresentations and "churning" that form the basis for the fraud claims. This is a classic example of plaintiffs' "Pavlovian inclusion of a RICO claim" in almost every securities lawsuit. *Huss v. Goldman, Sachs & Co.*, No. 86-C-2680 (N.D. Ill. May 13, 1986). As the *Huss* Court noted, plaintiffs in securities cases "not only assert the standard claims under the 1933 and 1934 federal acts, coupled of course with a state blue-sky law claim, but they now invariably also invoke [RICO]."

This type of "racketeering" claim is the rule, rather than the exception. RICO has become "essentially a federal business tort statute." *Bale*, 627 F. Supp. at 654; *see Bob Ladd, Inc.*, 633 F. Supp. at 244 n.l.; *Brener v. Becker Paribas Inc.*, 628 F. Supp. at 450; *West v. Drexel Burnham Lambert, Inc.*, 623 F. Supp. 26, 28-29 (W.D. Wash. 1985). A survey of trial court decisions conducted by the American Bar Association showed that 77% of all civil RICO cases reported involved securities fraud or mail or wire fraud in a commercial setting. *ABA Report* at 55-56. In that same survey, the ABA looked at 270 RICO lawsuits and discovered that broker-dealers were the primary defendants in at least 40 of the cases, banks were the primary defendants in 32 cases, and lawyers and accountants were defendants in 20 cases. *ABA Report* at 35 n.41. Another survey of 132 decisions in civil RICO cases indicated that 63 cases arose out of securities transactions or commodities trading, and another 38 cases arose out of commercial or contractual disputes. *AICPA White Paper* at 14-15.[23]

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[23] RICO is currently, and very frequently, being utilized for purposes far afield from those envisioned by Congress. Not only has civil RICO been used against securities broker-dealers, commodities traders, investment bankers, commercial banks, financing institutions, insurance companies, manufacturing concerns, accounting firms and attorneys, *see ABA Report* at 35 & n.41, it has also been used outside of the commercial world. *See, e.g., Martin-Trigona v. D'Amato & Lynch*, 539 F. Supp. 533 (S.D.N.Y. 1983) (legal assistance provided to *pro se* defendants in another action); *Pit Pros, Inc. v. Wolf*, 554 F. Supp. 284 (N.D. Ill. 1983) (landlord-tenant dispute); *Erlbaum v. Erlbaum*, [1982] Fed. Sec. L. *(footnote continued)*

Many district courts with first-hand experience with RICO claims have concluded that such disputes can be resolved by arbitrators with no risk to public policy concerns. *See, e.g., Steinberg v. The Illinois Co.*, No. 85-C-7131 (N.D. Ill. May 15, 1986); *Sacks*, Fed. Sec. L. Rep. ¶ 92,429 at 92,642; *see also West*, 623 F. Supp. at 29 ("there is no reason to pay lip service to a policy that justifies only a tiny minority of RICO cases").

Indeed, it is highly unlikely that the enforceability of arbitration agreements will ever arise in the types of cases that RICO was meant to address. A "contract" between "a shopkeeper [who] is approached by an organized crime henchman for protection money . . . undoubtedly would not contain an agreement to arbitrate." *Ross v. Mathis*, 624 F. Supp. at 117 n.6.[24] There is thus no reason to hold that the public policy underlying RICO prevents civil RICO claims from being arbitrated. The Second Circuit's decision to the contrary should be reviewed and reversed.

(footnote continued)

Rep. (CCH) ¶ 98,772 (E.D. Pa. July 13, 1982) (marital squabble); *Congregation Beth Yitzhok v. Briskman*, 566 F. Supp. 555 (E.D.N.Y. 1983) (religious dispute over control of congregation property); *King v. Lasher*, 572 F. Supp. 1377 (S.D.N.Y. 1983) (will contest).

[24] It is unlikely that claims involving the type of activity Congress intended RICO to address would be arbitrated for the additional reason that, under the Uniform Code of Arbitration, securities regulatory organizations have the right to decline the use of their arbitration facilities where the dispute "is not a proper subject matter for arbitration." Uniform Code of Arbitration § 1(b), N.A.S.D. Manual (CCH) § 3712(b). If this Court reversed the Second Circuit's *per se* rule, the lower courts could fashion a rule, such as the court applied in *West v. Drexel Burnham Lambert, Inc.*, 623 F. Supp. at 29, that the policy of enforcing arbitration agreements should prevail if the RICO claim "touches upon no great societal or public interest."

CONCLUSION

For all the foregoing reasons, petitioners respectfully request that this Court issue a writ of certiorari in this case to review the decision of the United States Court of Appeals for the Second Circuit.

DATED: NEW YORK, NEW YORK
July 14, 1986

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APPENDIX

APPENDIX A

STATUTORY AND REGULATORY PROVISIONS INVOLVED

United States Arbitration Act

9 U.S.C. § 2:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 3:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

Securities Act of 1933

Section 12(2), 15 U.S.C. § 77 l (2):

> Any person who –
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> * * *
>
> (2) offers or sells a security (whether or not exempted by the provisions of section 77c of this title, other than paragraph (2) of subsection (a) of

said section), by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission,

shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

Section 14, 15 U.S.C. § 77n:

Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void.

Securities Exchange Act of 1934

Section 10, 15 U.S.C. § 78j(b):

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

* * *

(b) To use or employ, in connection with the purchase or sale of any security registered on a national

securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Section 29(a), 15 U.S.C. § 78 cc(a):

Any condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void.

Racketeer Influenced and Corrupt Organizations Act

18 U.S.C. § 1962:

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

18 U.S.C. § 1964(c):

Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

Securities and Exchange Commission Regulation

Rule 10b-5, 17 C.F.R. § 240.10b-5:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 806, 894—August Term 1985

(Argued March 3, 1986 Decided April 16, 1986)

Docket Nos. 85-7844, 85-7846

EUGENE MCMAHON, JULIA MCMAHON, individually and as Trustees of THE DAVID J. HODDER & SON, INC. EMPLOYEE PENSION PLAN; THE DAVID J. HODDER & SON INC. PROFIT SHARING PLAN; THE LAURIE FUNERAL HOME, INC. EMPLOYEE PENSION PLAN; THE LAURIE FUNERAL HOME PROFIT SHARING PLAN,

Plaintiffs-Appellants-Cross-Appellees,

—v.—

SHEARSON/AMERICAN EXPRESS, INC., and MARY ANN MCNULTY,

Defendants-Appellees-Cross-Appellants.

Before:

FEINBERG, *Chief Judge*,
and TIMBERS and NEWMAN, *Circuit Judges*.

Appeal from an order entered September 25, 1985 in the Southern District of New York, Lloyd F. MacMahon, *District Judge*, requiring broker's customers to arbitrate claims under the Securities Exchange Act of 1934 and pendent state law claims pursuant to customer agreements containing an arbitration clause, and staying litigation of an alleged RICO violation claim pending arbitration.

Affirmed in part; reversed and remanded in part.

THEODORE G. EPPENSTEIN, New York, N.Y. (Madelaine Eppenstein, and Eppenstein & Eppenstein, New York, N.Y., on the brief), *for appellants*.

THEODORE A. KREBSBACH, New York, N.Y. (Harry D. Frisch and Shearson Lehman Brothers Inc., New York, N.Y., on the brief), *for appellees*.

WILLIAM J. FITZPATRICK and GERARD J. QUINN, New York, N.Y., submitted a brief *for the Securities Industry Association, Inc., amicus curiae*.

TIMBERS, *Circuit Judge*:

Eugene McMahon and Julia A. McMahon ("appellants"), individually and as trustees for various pension and profit-sharing plans, appeal from that part of an order entered September 25, 1985 in the Southern District of New York, Lloyd F. MacMahon, *District Judge*, 618 F. Supp. 384, which required appellants to arbitrate their claims against Shearson/American Express, Inc. and its registered representative, Mary Ann McNulty, ("Shearson") for alleged violations of the Securities Exchange Act of 1934 ("1934 Act") and state law claims of fraud and breach of fiduciary duties. Shearson appeals from that part of the order holding not arbitrable appellants' claim under the Racketeer Influenced Corrupt Organizations Act, 18 U.S.C. § 1962(c) (1982) ("RICO"). The district court stayed litigation of the RICO claim pending arbitration of the securities law and state law claims.

For the reasons set forth more fully below, under the settled law of this Circuit we hold that the district court erred in holding arbitrable appellants' claims under § 10(b) of the Securities Exchange Act, 15 U.S.C. § 78j(b) (1982), and Rule 10b-5, 17 C.F.R. § 240.10b-5 (1985). The district court, however, was correct in holding the RICO claim to be non-arbitrable. Applying the decision of the Supreme Court in *Dean Witter Reynolds, Inc.* v. *Byrd*, 105 S. Ct. 1238 (1985), we hold that arbitration of the pendent state law claims is required, even though bifurcated proceedings may result.

In short, we affirm in part, and reverse and remand in part.

I.

The facts and prior proceedings are simple and straightforward.

Appellants, individually and as trustees for various pension and profit-sharing plans, commenced this action against Shearson, a brokerage firm, and its registered representative who handled appellants' accounts. Appellants alleged that the registered representative of Shearson, with its knowledge, had violated § 10(b) of the 1934 Act and Rule 10b-5 by churning appellants' accounts, making false statements and omitting material facts from the advice given appellants. Appellants also alleged a RICO claim and state law claims for fraud and breach of fiduciary duties.

On June 15, 1982 Julia McMahon entered into a customer agreement with Shearson which contained an arbitration clause providing in relevant part as follows:

> "Unless unenforceable due to federal or state law, any controversy arising out of or relating to my accounts, to transactions with you for me or to this agreement or the breach thereof, shall be settled by arbitration in accordance with the rules, then in effect, of the National Association of Securities Dealers, Inc. or the Boards of Directors of the New York Stock Exchange, Inc. and/or the American Stock Exchange, Inc. as I may elect."

Relying on this clause, Shearson moved, pursuant to § 3 of the United States Arbitration Act, 9 U.S.C. § 3 (1982), to compel arbitration of all of appellants' claims. In the alternative, Shearson moved to dismiss the complaint for failure to state a claim upon which relief could be granted and on other grounds, none of which is relevant in view

of the district court's disposition of the motion to compel arbitration.

The district court rejected appellants' assertions that the customer agreement containing the arbitration clause is a contract of adhesion, that fraud is not an arbitrable issue, and that Shearson had waived its right to arbitrate. The court ordered arbitration of the § 10(b) and Rule 10b-5 claims, reasoning that recent Supreme Court decisions cast doubt on holding claims under the 1934 Act to be not arbitrable. In view of the important federal policies inherent in the enforcement of RICO by the federal courts, however, the court stayed litigation of that claim pending arbitration. The court ordered arbitration of the state law claims.

We shall examine first the district court's decision that the claims under § 10(b) and Rule 10b-5 are arbitrable. We shall then address the arbitrability of the RICO claim and state law claims.

II.

We turn first to the district court's disposition of appellants' 1934 Act claims.

We hold that the district court's decision that appellants' claims under § 10(b) and Rule 10b-5 are arbitrable is an unwarranted departure from the settled law of this Circuit and must be reversed.

In *Wilko* v. *Swan*, 346 U.S. 427 (1953), the Supreme Court held that, despite the United States Arbitration Act, 9 U.S.C. § 1 *et seq.*, claims arising under § 12(2) of the Securities Act of 1933 ("1933 Act") are not arbitrable. In reaching this result, the Court pointed out that an agreement to arbitrate claims is void under § 14 of the

1933 Act as a stipulation binding the securities customer to waive compliance with a provision of the Act.[1] The provision referred to is the aggrieved party's right to select the judicial forum under § 22(a) of the 1933 Act.

As our late colleague, Judge Friendly, noted in *Colonial Realty* v. *Bache & Co.*, 358 F.2d 178, 183 n.5 (2 Cir.), *cert. denied*, 385 U.S. 817 (1966), the non-waiver provision of § 14 of the 1933 Act has an almost identical counterpart in § 29(a) of the 1934 Act.[2] In view of *Wilko* and the similarity of the non-waiver provisions of the 1933 and 1934 Acts, we consistently have held that § 10(b) and Rule 10b-5 claims are not arbitrable.[3] In *Greater Continental Corp.* v. *Schechter*, 422 F.2d 1100, 1103 (2 Cir. 1970), we observed that alleged violations of Rule 10b-5 were "properly litigated in the courts where a

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1. Section 14 of the Securities Act of 1933, 15 U.S.C. § 77n (1982), provides:

> "Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void."

2. Section 29(a) of the Securities Act of 1934, 15 U.S.C. § 78cc(a) (1982), provides:

> "Any condition, stipulation or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void."

3. Following *Wilko*, several other courts of appeals likewise have held that claims arising under the 1934 Act are not arbitrable. *E.g.*, *De Lancie* v. *Birr, Wilson & Co.*, 648 F.2d 1255, 1258-59 (9 Cir. 1981); *Mansbach* v. *Prescott, Ball & Turben*, 598 F.2d 1017, 1039 (6 Cir. 1979); *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Moore*, 590 F.2d 823, 827-29 (10 Cir. 1978); *Weissbuch* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 558 F.2d 831, 833-35 (7 Cir. 1977); *Sibley* v. *Tandy Corp.*, 543 F.2d 540, 543 (5 Cir. 1976), *cert. denied*, 434 U.S. 824 (1977); *Ayres* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 538 F.2d 532, 536 (3 Cir.), *cert. denied*, 429 U.S. 1010 (1976).

complete record is kept of the proceedings and findings and conclusions are made." We also pointed out the similarity between § 14 of the 1933 Act and § 29(a) of the 1934 Act. *Id.* In *Allegaert* v. *Perot*, 548 F.2d 432, 436-38 (2 Cir.), *cert. denied*, 432 U.S. 910 (1977), we reiterated the view that claims under § 10(b) of the 1934 Act are not arbitrable, noting that the broad policy questions involved in securities law claims require a judicial forum for resolution of disputes. Again in *AFP Imaging Corp.* v. *Ross*, 780 F.2d 202, 205 (2 Cir. 1985), we held that, in an action which alleged violations of § 10(b) and Rule 10b-5, an arbitration clause in the contract was "unenforceable under the law of this Circuit".

Despite the settled law of this Circuit that claims under § 10(b) and Rule 10b-5 of the 1934 Act are not arbitrable, Shearson, speculating as to what the Supreme Court may do with our settled law, invites us to overrule our own precedents. We decline the invitation.

The district court, in addition to emphasizing the strong national policy favoring arbitration, focused on the Supreme Court's decisions in *Dean Witter Reynolds, Inc.* v. *Byrd*, 105 S. Ct. 1238 (1985), and *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506 (1974). In *Byrd*, since the securities broker had sought to compel arbitration of only pendent state claims—not claims arising under the 1934 Act—the Court declined to reach the issue of whether § 10(b) and Rule 10b-5 claims are arbitrable. 105 S. Ct. at 1240 n.1. Nevertheless, various courts, in holding that § 10(b) and Rule 10b-5 claims are arbitrable, have sought refuge in Justice White's concurring opinion in *Byrd*, 105 S. Ct. at 1244. Justice White stated that *Wilko's* reasoning cannot be "mechanically transplanted" to the 1934 Act. *Id.* While acknowledging the similarity

between § 14 of the 1933 Act and § 29(a) of the 1934 Act, Justice White reasoned that the narrower jurisdiction under the 1934 Act and the implied, rather than express, causes of action under § 10(b) and Rule 10b-5 distinguished claims under the 1934 Act from those arising under the 1933 Act. *Id.* Both the *Byrd* majority and Justice White's concurring opinion acknowledged that *Scherk* v. *Alberto-Culver Co.*, *supra*, 417 U.S. at 513-15, cast some doubt on the applicability of *Wilko* to claims under § 10(b) or Rule 10b-5. 105 S. Ct. at 1240 n.1; 105 S. Ct. at 1244.[4] The Supreme Court in *Byrd*, however, referred to the *Scherk* decision as follows:

> "The [*Scherk*] Court did not, however, hold that *Wilko* would not apply in the context of a § 10(b) or Rule 10b-5 claim, and *Wilko* has retained considerable vitality in the lower federal courts. Indeed, numerous District Courts and Courts of Appeals have held that the *Wilko* analysis applies to claims arising under § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and that agreements to arbitrate such claims are therefore unenforceable."

105 S. Ct. at 1240 n.1. (Citations omitted, being among those included in note 3, *supra*).

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4. Indeed, some courts within this Circuit have interpreted dicta in *Scherk* and *Byrd* as authority for holding such claims to be arbitrable. *E.g.*, *Intre Sport Ltd.* v. *Kidder, Peabody & Co.*, 625 F. Supp. 1303 (S.D.N.Y. 1985); *Finkle & Ross* v. *A.G. Becker Paribas, Inc.*, 622 F. Supp. 1505 (S.D.N.Y. 1985); *Jarvis* v. *Dean Witter Reynolds, Inc.*, 614 F. Supp. 1146 (D. Vt. 1985); *Brener* v. *Becker Paribas, Inc.*, 84 Civ. 5872 (S.D.N.Y. Dec. 31, 1985); *Ilan* v. *Shearson/American Express, Inc.*, 83 Civ. 9319 (S.D.N.Y. Dec. 23, 1985); *Johnson* v. *Kidder, Peabody & Co.*, 85 Civ. 178 (N.D.N.Y. July 30, 1985).

Other courts have continued to follow the settled law of this Circuit, holding claims under § 10(b) and Rule 10b-5 not arbitrable. *E.g.*, *Leone* v. *Advest, Inc.*, 624 F. Supp. 297 (S.D.N.Y. 1985); *Weizman* v. *Adornato*, 84 Civ. 3603 (E.D.N.Y. April 25, 1985).

In the instant case, the district court focused on the allegations of churning and misrepresentation centered on particular securities accounts and held inapplicable the broad policy concerns which this Circuit has recognized in holding 1934 Act claims not arbitrable. While a churning claim by its nature is limited to the specific accounts in question, such claims also reflect the public interest and are important in their deterrent effect. The securities laws generally, and the implied causes of action which the courts have recognized, are designed to protect the public, and particularly the less sophisticated investor. Moreover, this Circuit has not recognized an exception to the non-arbitrability of securities law claims in circumstances other than disputes between member firms of the stock exchanges. *E.g.*, *Coenen* v. *R. W. Pressprich & Co.*, 453 F.2d 1209 (2 Cir.), *cert. denied*, 406 U.S. 949 (1972); *Axelrod & Co.* v. *Kordich, Victor & Neufeld*, 451 F.2d 838 (2 Cir. 1971). We see no justification for carving out an exception to our non-arbitrability precedents for individual claims of churning and misrepresentation.

In short, the similarity of the non-waiver provisions, § 14 of the 1933 Act and § 29(a) of the 1934 Act, as well as the strong public policy concerns inherent in the securities laws and the legislative history that preceded their enactment, support the compelling need for a judicial forum in the resolution of securities law disputes. Although *Scherk* and *Byrd* may cast some doubt on whether the Supreme Court, if presented with the issue, would hold claims under § 10(b) and Rule 10b-5 to be non-arbitrable, it would be improvident for us to disregard clear judicial precedent in this Circuit based on mere speculation. We think that the orderly administration of justice will be best served if we as one of the inferior

courts follow Supreme Court precedent and adhere to the settled law of this Circuit, and a fortiori the district courts should do likewise.

III.

We turn next to the district court's disposition of appellants' RICO claim.

Pointing to the important federal policies inherent in the enforcement of RICO by the federal courts, the district court stayed litigation of the RICO claim pending arbitration of the state law claims and the securities law claims. The RICO claim was thus placed on the suspense docket pending the outcome of arbitration of the other claims.

In other contexts, we have recognized the inappropriateness of the United States Arbitration Act when strong public policy considerations are involved. In *American Safety Equipment* v. *J.P. Maguire* 391 F.2d 821 (2 Cir. 1968), we stated that "[a] claim under the antitrust laws is not merely a private matter. The Sherman Act is designed to promote the national interest in a competitive economy; thus, the plaintiff asserting his rights under the Act has been likened to a private attorney-general who protects the public's interest." 391 F.2d at 826. We hold that there are comparable concerns inherent in the enforcement of RICO claims.

The Supreme Court has recognized that arbitration is appropriate in *international* antitrust disputes because of concerns for international comity, respect for the capacities of foreign and transnational tribunals, and the need for predictability in the international commercial system. *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth,*

Inc., 105 S. Ct. 3346 (1985). The reasoning of our decision in *American Safety*, however was not disputed in *Mitsubishi*, "as applied to agreements to arbitrate arising from domestic transactions." 105 S. Ct. at 3355. Enforcement of the RICO statute is particularly appropriate in a judicial forum because of strong policy concerns, the need for development of the record, and judicial clarification and resulting consistency in resolving disputes under this relatively new statute.

The district court had placed the RICO claim on the suspense docket because the arbitrable claims "permeate the case, and the validity of the RICO claim is uncertain at this stage of the litigation." 618 F. Supp. at 389. Since we have held that the securities law claims are not arbitrable, it is now appropriate that the securities law and RICO claims be litigated together since they arise out of the same transaction.[5]

IV.

Finally, this brings us to the district court's disposition of appellants' pendent state law claims.

In addition to the claims that Shearson had violated § 10(b), Rule 10b-5, and RICO, appellants' amended complaint alleged state law claims for common law fraud and breach of fiduciary duties. The district court granted Shearson's motion to compel arbitration of these pendent state law claims as well as the securities law claims.

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5. Appellants suggest that the district court's denial of arbitration of the RICO claim was not an appealable interlocutory order under 28 U.S.C. § 1292(a) (1982). We disagree. *See Ettelson* v. *Metropolitan Life Insurance Co.*, 317 U.S. 188, 191 (1942); *Enelow* v. *New York Life Insurance Co.*, 293 U.S. 379, 383 (1935); *Poriss* v. *Aacon Auto Transport, Inc.*, 685 F.2d 56, 59-60 (2 Cir. 1982).

Under the Supreme Court's decision in *Dean Witter Reynolds, Inc.* v. *Byrd, supra*, these state law claims must be sent to arbitration where there is an enforceable arbitration clause and where a party's motion to compel arbitration encompasses the state law claims, as here.[6] *See also AFP Imaging Corp.* v. *Ross, supra*, 780 F.2d at 205. The Court's language in *Byrd* is unequivocal.

> "[T]he Arbitration Act requires district courts to compel arbitration of pendent arbitrable claims when one of the parties files a motion to compel, even where the result would be the possibly inefficient maintenance of separate proceedings in different forums."

105 S. Ct. at 1241. The Court also recognized that such bifurcated proceedings could result where securities or antitrust violations are alleged. 105 S. Ct. at 1241 n.5. We hold that the district court correctly held that the pendent state claims were arbitrable. Despite the potential inefficiency of bifurcated proceedings, we are obliged under *Byrd* to affirm that part of the district court's order compelling arbitration of the pendent state law claims.[7]

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6. Appellants challenge the arbitrability of their claims against Shearson on numerous grounds. In view of our rulings on the securities and RICO claims, these arguments are not relevant to the litigation of the disputes under federal law but they do require brief examination since, generally, state law claims for fraud and breach of fiduciary duties are arbitrable if there is a valid arbitration clause. In the instant case, the district court found that the elements for compelling arbitration were present, *i.e.*, an agreement to arbitrate, arbitrable claims, and the absence of a waiver. We find no reason to disturb the district court's threshold determination that an enforceable arbitration clause was in effect. While we hold the federal claims here are not within the scope of the arbitration clause, we also hold that the court correctly compelled arbitration of the state law claims for fraud and breach of fiduciary duties..

7. Of course, if appellants, upon remand of this case to the district court, should withdraw their pendent state law claims, that would

V.

To summarize:

We hold that the district court erred in departing from this Circuit's precedents in granting Shearson's motion to compel arbitration of the claims alleging a violation of § 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5. The district court properly denied the motion to compel arbitration of the RICO claim because of the inherent public interest underlying that cause of action and the need for examining and resolving such disputes in the federal courts. The district court properly compelled arbitration of the pendent state law claims.[8]

Affirmed in part; reversed and remanded in part.

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result in no claims left to be arbitrated. All remaining claims would be litigated in the federal court. And bifurcated proceedings would be avoided. *See AFP Imaging Corp.* v. *Ross*, *supra*, 780 F.2d at 205.

8. Though the applicability of *Wilko* v. *Swan*, *supra*, to issues arising under § 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934 is settled in this Circuit, it would nonetheless have been helpful if the Securities and Exchange Commission had volunteered an amicus brief to inform us of its views. Without any request, the Commission rendered substantial help with respect to corresponding questions under the Securities Act of 1933 in *Wilko* v. *Swan*, *supra*—both in this Court, 201 F.2d at 440, 441-42, 445, and in the Supreme Court, 346 U.S. at 427, 428, 440.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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EUGENE McMAHON and JULIA McMAHON, individually and as Trustees of The David J. Hodder & Son, Inc. Employee Pension Plan; The David J. Hodder & Son, Inc. Profit Sharing Plan; The Laurie Funeral Home, Inc. Employee Pension Plan; The Laurie Funeral Home Profit Sharing Plan,

Plaintiffs,

– against –

SHEARSON/AMERICAN EXPRESS, INC. and MARY ANN McNULTY,

Defendants.

----------X

84 Civ. 3331 (LFM)

OPINION

APPEARANCES:

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MacMahon, District Judge.

Defendants move, pursuant to 9 U.S.C. § 3 (1970), for an order staying this action pending arbitration, or, in the alternative, pursuant to Rules 12(b)(6), 12(f) and 9(b), Fed.R.Civ.P., for an order dismissing plaintiffs' amended complaint for failure to state a claim upon which relief can be granted.

Facts

This is an action brought by plaintiffs, Eugene and Julia A. McMahon, individually and as trustees of the David J. Hodder & Son, Inc. Employee Pension Plan; the David J. Hodder & Son, Inc. Profit Sharing Plan; the Laurie Funeral Home, Inc. Employee Pension Plan; and the Laurie Funeral Home, Inc. Profit Sharing Plan ("the trusts"), against Shearson/American Express, Inc. ("Shearson"), a brokerage firm, and Mary Ann McNulty ("McNulty"), a registered representative who was responsible for plaintiffs' accounts at Shearson.

On June 15, 1982, in connection with the opening of her joint account at Shearson, Julia McMahon entered into a customer's agreement which contained the following arbitration provision:

> "Unless unenforceable due to federal or state law, *any controversy arising out of or relating to my accounts, to transactions with you for me or to this agreement or the breach thereof, shall be settled by arbitration* in accordance with the rules, then in effect, of the National Association of Securities Dealers, Inc. or the Boards of Directors of the New York Stock Exchange, Inc. and/or the American Stock Exchange, Inc. as I may elect. * * * Judgment upon any award rendered by the arbitrators may be entered in any court having jurisdiction thereof (emphasis added)."[1]

On October 26, 1984, plaintiffs filed an amended complaint, alleging, in essence, that McNulty, with the knowledge and consent of Shearson, (1) engaged in "churning" or the fraudulent and wilful practice of trading extensively solely to maximize commissions, (2) intentionally and recklessly violated Section 10(b)

of the Securities Exchange Act of 1934 ("the 1934 Act")[2] and Rule 10b-5 promulgated thereunder, by making false statements and omitting material facts from the advice given plaintiffs, and (3) violated the Racketeer Influenced and Corrupt Organization Act of 1974 ("RICO").[3]

Defendants move for an order compelling plaintiffs to arbitrate their state law claims, as well as their claims under Section 10(b) of the 1934 Act and RICO. Alternatively, defendants move to dismiss the amended complaint on the following grounds: (1) failure to comply with the pleading requirements of Rule 9(b), Fed.R.Civ.P.; (2) lack of subject matter and pendent jurisdiction; (3) absence of an implied private cause of action for alleged violation of the rules of the New York Stock Exchange, Inc. and the National Association of Securities Dealers, Inc.; (4) failure to state a claim under RICO; and (5) unavailability of punitive damages.

Discussion

The United States Arbitration Act,[4] "reversing centuries of judicial hostility to arbitration agreements, was designed to allow parties to avoid 'the costliness and delays of litigation,' and to place arbitration agreements 'upon the same footing as other contracts . . . . ' "[5] Accordingly, the Act provides:

> "A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy arising out of such contract or transactions . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

The customer's agreement, entered into between Shearson and McMahon, contains McMahon's agreement to arbitrate "any controversy arising out of or relating to" her securities at Shearson or to any "transactions" with Shearson for her. Defendants have therefore petitioned this court for an order compelling arbitration of this action.[6]

To prevail on a motion to compel arbitration, a party needs

only to establish (1) the existence of an agreement to arbitrate, (2) arbitrable claims, and (3) no waiver of the right to arbitrate.[7] Plaintiffs contend that the aribtration provision in the customer's agreement is not enforceable because (1) the customer's agreement is a contract of adhesion, (2) fraud is not an arbitrable issue, and (3) defendants have waived their right to arbitrate.

We find that plaintiffs' arguments are wholly unconvincing. First, it is well settled that one who signs a contract, in the absence of fraud or misconduct by another contracting party, is conclusively presumed to know its contents and to assent to them.[8] Julia McMahon signed the customer's agreement and has not demonstrated that it was entered into under fraud or duress. Arbitration clauses are routinely upheld by the courts, and, given plaintiffs' sizeable investment, there is nothing to indicate that they were without bargaining power. Moreover, in *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402-404 (1967), the Supreme Court held that "a broad arbitration clause will be held to encompass arbitration of the claim that the contract itself was induced by fraud." Therefore, even if we were to assume that the customer's agreement was fraudulently induced, the breadth of the arbitration provision would mandate that the issue of fraud in the inducement also be referred to arbitration.

Second, plaintiffs argue that their allegations of common law fraud are not arbitrable because the arbitration provision does not contemplate an action in tort. This argument is without merit. The substance of plaintiffs' amended complaint, that defendants excessively "churned" their securities accounts and fraudulently represented the status of the accounts, is clearly within the scope of the arbitration clause as it arose from and relates to plaintiffs' accounts at Shearson. Moreover, in *Dean Witter Reynolds Inc.* v. *Byrd*, ____ *U.S.* ____, 105 S.Ct. 1238 (1985), the Supreme Court recently held that a district court is required to compel arbitration of state law fraud claims where the parties entered into an arbitration agreement similar to the one presented here.

Finally, plaintiffs contend that defendants waived their right to arbitrate this action when they commenced a state court action against plaintiffs. We find that, since the prior state court

proceeding involves issues only tangentially related to those at stake here, that proceeding has no bearing on this action and certainly no effect on plaintiffs' agreement to arbitrate. We therefore conclude that the federal Arbitration Act[9] mandates that we compel arbitration of all arbitrable claims arising out of plaintiffs' accounts or related transactions at Shearson.[10]

The remaining question for us is which of plaintiffs' claims are "arbitrable." The state law fraud claims are clearly arbitrable under the Supreme Court's decision in *Byrd*. The RICO claim is not arbitrable because of the important federal policies inherent in the enforcement of RICO by the federal courts.[11] Claims based on violations of the federal securities laws have been considered to be non-arbitrable based on the doctrine enunciated in *Wilko* v. *Swan*, 346 U.S. 427 (1953). The validity of the *Wilko* doctrine, as applied to cases involving transactions outside the protection of the Securities Act of 1933 ("the 1933 Act"), however, is clearly suspect. The arbitrability of plaintiffs' Section 10(b) claims under the 1934 Act, therefore, merits some discussion.

In *Wilko*, the Supreme Court held that an agreement to arbitrate claims that arise under Section 12(2) of the 1933 Act[12] was not enforceable. The Court relied on three interconnected statutory provisions: (1) Section 14 of the 1933 Act which voids any "stipulation . . . binding any person acquiring any security to waive compliance with any provision" of the 1933 Act; (2) Section 12(2) which creates "a special right to recover for misrepresentation which differs substantially from the common law action;" and (3) Section 22 which allows suits in any state or federal court of competent jurisdiction and provides for nationwide service.[13] The Court concluded that an agreement to arbitrate was a stipulation waiving the right to seek a judicial remedy and therefore was void.[14]

Several lower federal courts have assumed that *Wilko* applies to 1934 Act claims and have grouped claims under Section 12(2) of the 1933 Act, as well as claims under Section 10(b) of the 1934 Act, under the umbrella of non-arbitrable claims.[15]

The Supreme Court, however, first expressed reservations about the propriety of applying *Wilko* to claims arising under the 1934 Act in *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506 (1974). These

reservations were recently reiterated in *Byrd*, *supra*, where the Court again "questioned the applicability of *Wilko* to a claim arising under Section 10(b) of the 1934 Act or under Rule 10b-5 because the provisions of the 1933 and 1934 Acts differ and because, unlike Section 12(2) of the 1933 Act, Section 10(b) of the 1934 Act does not give rise to a private cause of action."[16] The *Byrd* court declined to resolve the applicability of *Wilko* to Section 10(b) claims because the question was not properly before the Court. Justice White, however, in his concurring opinion, stated that "*Wilko's* reasoning cannot be mechanically transplanted to the 1934 Act" and cast substantial doubt on the contrary holdings of lower federal courts.[17] He emphasized the salient distinctions between Sections 12(2) and 10(b):

> "While § 29 of that Act, 15 U.S.C. § 78cc(a), is equivalent to § 14 of the 1933 Act, counterparts of the other two provisions are imperfect or absent altogether. Jurisdiction under the 1934 Act is narrower, being restricted to the federal courts. 15 U.S.C. § 78aa. More important, the cause of action under § 10(b) and Rule 10b-5, involved here, is implied rather than express. See *Herman & MacLean v. Huddleston*, 459 U.S. 375, 380, and nn. 9-10, 103 S.Ct. 683, 686-87, and nn. 9-10, 74 L.Ed.2d 548 (1983). The phrase 'waive compliance with *any provision of this chapter*,' 15 U.S.C. § 78cc(a) (emphasis added), is thus literally inapplicable. Moreover, *Wilko's* solicitude for the federal cause of action—the 'special right' established by Congress, 346 U.S., at 431, 74 S.Ct., at 184—is not necessarily appropriate where the cause of action is judicially implied and not so different from the common law action."[18]

The only time the Supreme Court was faced with the issue of whether *Wilko* applied to Section 10(b) claims, albeit in the context of an international contract, the Court held that the claims were subject to the parties' agreement to arbitrate.[19] The Court noted that "a colorable argument could be made that even the semantic reasoning of the *Wilko* opinion does not control the

case before us," as "[t]here is no statutory counterpart of § 12(2) in the [1934 Act], and neither § 10(b) . . . nor Rule 10b-5 speaks of a private remedy. . . ."[20] Similarly, we entertain grave doubts about the legal correctness of overriding the parties' express agreement concerning arbitration of all controversies in the name of protecting federal jurisdiction over implied rights of action.

Based on Justice White's concurring opinion in *Byrd*, the reservations by the Supreme Court in *Scherk* v. *Alberto-Culver Co.*, *supra*, and the strong national policy favoring the enforcement of arbitration agreements articulated in *Moses H. Cone Memorial Hospital* v. *Mercury Const. Corp.*, 460 U.S. 1 (1983), several district courts have held that the *Wilko* doctrine does not extend to Section 10(b) claims.[21]

Although there exists precedent in this circuit holding that Section 10(b) claims are not arbitrable,[22] there is doubt that these decisions retain viability in light of the Supreme Court's ruling in *Byrd*. In *Allegaert* v. *Perot*, 548 F.2d 432 (2d Cir. 1977), the trustrees of a bankrupt securities brokerage firm sued four individuals, several corporate members of the New York Stock Exchange and the Exchange itself, alleging violations of the Bankruptcy Act,[23] the 1934 Act and various state corporate laws. In deciding whether to compel arbitration of the alleged violations of the anti-fraud provisions of the securities laws, the court examined "the public interest in the dispute, the degree to which the nature of the evidence made the judicial forum preferable to arbitration, and the extent to which the agreement was a product of free choice."[24] Pointing out that the case was "a claim of wholesale fraud" brought on behalf of hundreds of creditors, the court determined that the claim was imbued with strong public interest and protective public policy considerations which were inappropriate for enforcement by arbitration.[25]

We are not presented here with claims involving fraud, nor industry-wide practices which may tend to ensnare an unsuspecting public.[26] Plaintiffs' claim is simply that a single securities representative "churned" their accounts and made certain

misrepresentations concerning the status of those accounts. Such a dispute over the management of an account neither raises broad issues of policy nor involves widespread industry practices and, therefore, touches none of the concerns at stake in *Allegaert* which mandate a judicial forum.

We note the distinction between the 1933 Act and the 1934 Act, as well as the strong national policy favoring arbitration, and thereby accept *Byrd's* invitation to compel the parties' compliance with their express contractual obligations concerning arbitration. We consequently hold that the *Wilko* doctrine should not be extended to plaintiffs' Section 10(b) claims.[27] We do not find that all Section 10(b) claims, no matter what their factual underpinnings, are arbitrable, but only that this particular claim relating to the management of a securities account is appropriate for resolution by arbitration.[28] The non-arbitrable RICO claim shall be stayed pending arbitration of the common law and securities fraud claims. This stay is appropriate where the arbitrable claims "permeate" the case, and the validity of the RICO claim is uncertain at this early stage of the litigation.[29]

Accordingly, defendants' motions are granted to the extent that this court orders arbitration of all of plaintiffs' claims, except their claim brought under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962(c) (1982), the litigation of which is temporarily stayed pending arbitration. This action is placed on the suspense docket pending the outcome of arbitration.

So ordered.

Dated: New York, N. Y.
September 25, 1985

/s/ Lloyd F. MacMahon
LLOYD F. MACMAHON
United States District Judge

FOOTNOTES

1. Customer's Agreement ¶ 13.

2. 15 U.S.C. § 78j(b) (1981).

3. 18 U.S.C. § 1962(c) (1982).

4. 9 U.S.C. §§ 1 *et seq.* (1970).

5. *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 510-511 (1974), *citing* H.R. Rep. No. 96, 68th Cong., 1st Sess., 1, 2 (1924).

6. 9 U.S.C. § 3 (1970).

7. *Bigge Crane & Rigging Co.* v. *Docutel Corp.*, 371 F. Supp. 240 (E.D.N.Y. 1973).

8. *Fustok* v. *Conticommodity Services, Inc.*, 577 F. Supp. 852, 856 (S.D.N.Y. 1984).

9. 9 U.S.C. § 3 (1970).

10. *Dean Witter Reynolds Inc.* v. *Byrd*, ____ U.S. ____, 105 S.Ct. 1238 (1985).

11. *See S.A. Mineracao da Trindade-Samitri* v. *Utah Int'l*, 576 F. Supp. 566, 574-576 (S.D.N.Y. 1983).

12. 15 U.S.C. § 77 1 (2) (1981).

13. *Wilko* v. *Swan*, 346 U.S. 427, 431, 434-435 (1953); 15 U.S.C. §§ 77n, 77 1 (2), 77v (1981). *See also Dean Witter Reynolds Inc.* v. *Byrd*, *supra* (White, J., *concurring*).

14. *Wilko* v. *Swan*, *supra*, 346 U.S. at 434-435.

15. *See, e.g., DeLancie* v. *Birr, Willson & Co.*, 648 F.2d 1255, 1258-59 (9th Cir. 1981); *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Moore*, 590 F.2d 823, 827-829 (10th Cir. 1978); *Allegaert* v. *Perot*, 548 F.2d 432 (2d Cir. 1977).

16. *Dean Witter Reynolds Inc.* v. *Byrd, supra*, ____ U.S. ____, 105 S.Ct. at 1240 n.l.

17. *Dean Witter Reynolds Inc.* v. *Byrd, supra* (White, J., *concurring*), ____ U.S. ____, 105 S.Ct. at 1243.

18. *Id.*, ____ U.S. ____, 105 S.Ct. at 1244

19. *Scherk* v. *Alberto-Culver Co., supra.*

20. *Id.*, 417 U.S. at 513.

21. *See Raiford* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 83-685A (N.D. Ga. May 16, 1985); *Gregory* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 84-1647 (M.D. Fla. March 9, 1985); *Greenstein* v. *First Biscayne Corp.*, No. 82-0584 (S.D. Fla. May 16, 1985); *Mann* v. *Foster & Marshall*, No. C84-925D (W.D. Wash. May 24, 1985).

22. *See, e.g., Allegaert* v. *Perot, supra.*

23. 11 U.S.C. §§ 701 *et seq.* (1979).

24. *Allegaert* v. *Perot, supra*, 548 F.2d at 436.

25. *Id.*, 548 F.2d at 436-38.

26. *See Greater Continental Corp.* v. *Schechter*, 422 F.2d 1100, 1103 (2d Cir. 1970).

27. *Finn* v. *Davis*, 610 F. Supp. 1079 (S.D. Fla. 1985); *Wells* v. *Oppenheimer & Co.*, 106 F.R.D. 258 (S.D.N.Y. 1985).

28. *Finn* v. *Davis*, *supra*.

29. *See S.A. Mineracao da Trindade-Samitri* v. *Utah Int'l*, *supra*, 566 F. Supp. at 576.

APPENDIX D

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, ENTERED ON APRIL 16, 1986

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixteenth day of April one thousand nine hundred and eighty-six

Present: HON. WILFRED FEINBERG,
CHIEF JUDGE,
HON. WILLIAM H. TIMBERS,
HON. JON O. NEWMAN,
Circuit Judges,

EUGENE McMAHON, JULIA McMAHON, individually and as Trustees of THE DAVID J. HODDER & SON, INC. EMPLOYEE PENSION PLAN; THE DAVID J. HODDER & SON, INC. PROFIT SHARING PLAN; THE LAURIE FUNERAL HOME, INC. EMPLOYEE PENSION PLAN; THE LAURIE FUNERAL HOME PROFIT SHARING PLAN,

Plaintiffs-Appellants-Cross-Appellees,

—V—

SHEARSON /AMERICAN EXPRESS, INC., and MARY ANN McNULTY,

Defendants-Appellees-Cross-Appellants.

Docket Nos. 85-7844
85-7846

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the Order of said District Court be and it hereby is affirmed in part and reversed and remanded in part to the said district court for further proceedings in accordance with this opinion.

ELAINE B. GOLDSMITH,
Clerk

/s/ Edward J. Guardaro
Edward J. Guardaro,
Deputy Clerk

APPENDIX E

District Court Cases Addressing the Enforceability of Agreements to Arbitrate § 10(b) Claims

A. Cases Holding § 10(b) Claims Arbitrable

First Circuit

Arent v. Shearson/American Express, Inc., [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,523 (D. Mass. Dec. 20, 1985)

Mowbray v. Moseley, Hallgarten, Estabrook & Weden, Inc., No. 83-2851-C (D. Mass. July 16, 1985), *vacated*, No. 85-1647 (1st Cir. July 3, 1986)

Prawer v. Dean Witter Reynolds, Inc., 626 F. Supp. 642 (D. Mass. 1985)

Sevinor v. Merrill Lynch, Pierce, Fenner & Smith, No. 84-3240-N (D. Mass. July 19, 1985) (appeal pending)

Second Circuit

Brener v. Becker Paribas Inc., 628 F. Supp. 442 (S.D.N.Y. 1985)

Finkle & Ross v. A.G. Becker Paribas, Inc., 622 F. Supp. 1505 (S.D.N.Y. 1985)

Ilan v. Shearson/American Express, Inc., 632 F. Supp. 886 (S.D.N.Y. 1985)

Intre Sport Ltd. v. Kidder Peabody & Co., 625 F. Supp. 1303 (S.D.N.Y. 1985), *modified*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 92,714 (S.D.N.Y. Apr. 21, 1986) (decided after *McMahon* but following *AFP Imaging Corp.*)

Jarvis v. Dean Witter Reynolds, Inc., 614 F. Supp. 1146 (D. Vt. 1985)

Johnson v. Kidder Peabody & Co., No. 85 Civ. 178 (N.D.N.Y. July 29, 1985)

McMahon v. Shearson/American Express, Inc., 618 F. Supp. 384 (S.D.N.Y. 1985), *aff'd in part, rev'd in part*, 788 F.2d 94 (2d Cir. 1986)

Shamir v. Kidder, Peabody & Co., [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,511 (S.D.N.Y. Mar. 11, 1986)

Terra Resources I v. Burgin, [Current] Fed. Sec. L. Rep. (CCH) ¶ 92,703 (S.D.N.Y. Apr. 1, 1986)

Wall Street Assocs. v. Becker Paribas, Inc., No. 85 Civ. 4649 (S.D.N.Y. Sept. 19, 1985)

Third Circuit

Baker v. Paine, Webber, Jackson & Curtis, Inc., [Current] Fed. Sec. L. Rep. (CCH) ¶ 92,757 (D. N.J. Apr. 10, 1986)

Fourth Circuit

Fisher v. Prudential-Bache Securities, Inc., No. Y-86-388 (D. Md. May 12, 1986) (appeal pending)

Land v. Dean Witter Reynolds, Inc., 617 F. Supp. 52 (E.D. Va. 1985)

Shotto v. Laub, 632 F. Supp. 516 (D. Md. 1986)

Fifth Circuit

Coonly v. Rotan Mosle, Inc., No. A-83-CA-529 (W.D. Tex. June 11, 1985)

Frye v. Paine Webber Jackson & Curtis, [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,516 (N.D. Tex. Dec. 26, 1985)

Hymel v. Delta Petroleum & Energy Corp., No. SA-83-CA-362 (W.D. Tex. June 19, 1985)

McKinney v. Sutton, No. C-85-15 (S.D. Tex. Nov. 8, 1985)

Russell v. Shearson Lehman Bros., Inc., No. CA3-85-2335-R (N.D. Tex. Mar. 10, 1986) (appeal pending)

Sixth Circuit

Drazdik v. Kidder, Peabody & Co., No. C-85-2442 (N. D. Ohio Mar. 31, 1986) (appeal pending)

Gerhardstein v. Shearson/American Express, Inc., [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,512 (N.D. Ohio Mar. 3, 1986)

Moncrieff v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 623 F. Supp. 1005 (E.D. Mich. 1985)

Yee v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., No. 84-4017 (E.D. Mich. Mar. 31, 1986)

Seventh Circuit

Austad v. Drexel Burnham Lambert, Inc., No. 85-C-9759 (N.D. Ill. Mar. 27, 1986)

Steinberg v. The Illinois Co., No. 85-C-7131 (N.D. Ill. May 15, 1986)

Willis v. Prudential-Bache Securities, Inc., No. L 85-0059 (N.D. Ind. July 10, 1985)

Eighth Circuit

Bob Ladd, Inc. v. Adcock, 633 F. Supp. 241 (E.D. Ark. 1986)

Houlihan v. Schmacker and *Meyer v. Schmacker*, Nos. 83-159 C(5) and 83-1356 C(5) (E.D. Mo. May 3, 1985)

Peele v. Kidder, Peabody & Co. Inc., 620 F. Supp. 61 (W.D. Mo. 1985) (appeal pending)

Sulit v. Dean Witter Reynolds, Inc., [Current] Fed. Sec. L. Rep. (CCH) ¶ 92,755 (W.D. Mo. Mar. 27, 1986)

Ninth Circuit

Anderson v. Paine Webber Jackson & Curtis, [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,446 (C.D. Cal. Sept. 23, 1985)

Blakley v. Prudential Bache Securities, Inc. No. R-85-442 (D. Nev. Dec. 9, 1985)

Byrd v. Dean Witter Reynolds, Inc., [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,225 (S.D. Cal. July 8, 1985) (on remand from Supreme Court)

Dees v. Distenfield, 618 F. Supp. 123 (C.D. Cal. 1985)

Geller v. Nasser, [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,409 (C.D. Cal. Nov. 18, 1985)

Jope v. Bear Stearns & Co., [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,393 (N.D. Cal. Nov. 15, 1985)

Mann v. Foster & Marshall/American Express, Inc., No. C84-925D (W.D. Wash. June 3, 1985)

Marx v. Dean Witter Reynolds, Inc., [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,311 (C.D. Cal. Aug. 23, 1985)

Sacks v. Dean Witter Reynolds, Inc., [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,429 (C.D. Cal. Dec. 31, 1985)

Sapa v. Kelly, No. CV 85 1292 (S.D. Cal. Aug. 20, 1985)

West v. Drexel Burnham Lambert, Inc., 623 F. Supp. 26 (W.D. Wash. 1985)

Tenth Circuit

Butz v. Dean Witter Reynolds, Inc., No. 83-7-2043 (D. Colo. Apr. 16, 1985)

Eleventh Circuit

Ackerman v. Drexel Burnham Lambert, Inc., No. 84-6739 (S.D. Fla. May 14, 1985)

Adrian v. Smith Barney, Harris Upham & Co., No. 84-1652-Civ-T-13 (M.D. Fla. Sept. 17, 1985)

Batteh v. Prudential-Bache Securities, Inc., No. 84-452-Civ-J-14 (M.D. Fla. July 29, 1985)

Boyd v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 614 F. Supp. 940 (S.D. Fla. 1985)

Butler v. Dean Witter Reynolds, Inc., No. CV 84-L-5680-NE (N.D. Ala. Sept. 5, 1985)

Byrne v. Oppenheimer & Co., No. 84-264-Civ-T-17 (M.D. Fla. Aug. 2, 1985)

Chandler v. Drexel Burnham Lambert, Inc., No. C-85-1585-A (N.D. Ga. Oct. 29, 1985) (appeal pending)

Colangelo v. Dean Witter Reynolds, Inc., [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,365 (M.D. Fla. July 23, 1985)

Crabb v. Merrill Lynch, Pierce, Fenner & Smith, Inc., No. 84-1145-Civ-J-12 (M.D. Fla. Oct. 7, 1985)

Driscoll v. Smith Barney, Harris Upham & Co., No. 84-8223 (S.D. Fla. June 6, 1985)

Finn v. Davis, 610 F. Supp. 1079 (S.D. Fla. 1985)

Greenstein v. First Biscayne Corp., No. 82-0584 Civ. (S.D. Fla. May 16, 1985)

Gregory v. Merrill Lynch, Pierce, Fenner & Smith, No. 84-1647 Civ. 1-10 (M.D. Fla. Apr. 9, 1985)

Greist v. Merrill Lynch, Pierce, Fenner & Smith, Inc., No. 83-6826-Civ (S.D. Fla. Aug. 26, 1985)

Hashemi v. Merrill Lynch, Pierce, Fenner & Smith, No. C82-2948A (N.D. Ga. Aug. 6, 1985)

Leffler v. Prudential-Bache Securities, Inc., No. 84-1292-Civ-J-12 (M.D. Fla. Sept. 5, 1985)

Miller v. Drexel Burnham Lambert, Inc., No. 83-6871 (S.D. Fla., July 31, 1985), *rev'd*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 92,783 (11th Cir. June 17, 1986) (per curiam)

Niven v. Dean Witter Reynolds, Inc., [1984-85 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,059 (M.D. Fla. Mar. 28, 1985)

Oliver v. Harris, No. CV 184-93 (S.D. Ga. Aug. 29, 1985)

Pruzan v. Paine, Webber, Jackson & Curtis, No. C84-2016A (N.D. Ga. Aug. 30, 1985)

Raiford v. Merrill Lynch, Pierce, Fenner & Smith, [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,269 (N.D. Ga. May 16, 1985)

Rockoff v. Shearson Lehman/American Express, Inc., [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,513 (S.D. Fla. Feb. 12, 1986)

Ross v. Mathis, 624 F. Supp. 110 (N.D. Ga. 1985)

Rowles v. Dean Witter Reynolds, Inc., No. 84-1393-Civ-J-14 (M.D. Fla. Aug. 5, 1985)

Sanders v. Robinson Humphrey/American Express, Inc., [1985-86 Transfer Binder] Fed. Sec. L Rep. (CCH) ¶ 92,548 (N.D. Ga. Mar. 27, 1986)

Schultz v. Robinson-Humphrey/American Express Inc., [Current] Fed. Sec. L. Rep. (CCH) ¶ 92,515 (M.D. Ga. Mar. 4, 1986)

Sigvartsen v. Smith Barney Harris Upham & Co., No. 84-540-Civ-T-15 (M.D. Fla. June 4, 1985)

Walch v. Dean Witter Reynolds, Inc., [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,060 (M.D. Fla. Apr. 25, 1985)

Westwind Transp., Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., No. 84-734 (M.D. Fla. Apr. 9, 1985)

B. *Cases Holding § 10(b) Claims Not Arbitrable*

District of Columbia Circuit

Kalali v. Prudential-Bache Securities, Inc., No. 85-3237 (D. D.C. June 30, 1986)

Second Circuit

Becker v. Silverman, No. 85 Civ. 6757 (S.D.N.Y. June 24, 1986) (decided after *McMahon*)

Couvaris v. Paine Webber Jackson & Curtis Inc., [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,554 (S.D.N.Y. Feb. 24, 1986)

Brill v. Prudential-Bache Securities, Inc., No. 84 Civ. 0846 (S.D.N.Y. June 13, 1986) (dicta) (decided after *McMahon*)

Clark v. Kidder, Peabody & Co., Inc., [Current] Fed. Sec. L. Rep. (CCH) ¶ 92,729 (S.D.N.Y. May 9, 1986) (decided after *McMahon*)

Farino v. Advest Inc., [Current] Fed. Sec. L. Rep. (CCH) ¶ 92,758 (E.D.N.Y. May 1, 1986) (decided after *McMahon*)

Gilmore v. Shearson/American Express, Inc., No. 84 Civ. 9011 (S.D.N.Y. May 20, 1986) (decided after *McMahon*)

Intre Sport, Ltd. v. Kidder, Peabody & Co., [Current] Fed. Sec. L. Rep. (CCH) ¶ 92,714 (S.D.N.Y. Apr. 21, 1986) (decided after *McMahon* but following *AFP Imaging*)

IRPA Corp. v. Shearson/American Express, Inc., No. 85 Civ. 1629 (S.D.N.Y. May 28, 1986) (decided after *McMahon*) (appeal pending)

Leone v. Advest, Inc., 624 F. Supp. 297 (S.D.N.Y. 1985)

Rush v. Oppenheimer & Co., No. 84 Civ. 3219 (S.D.N.Y. June 27, 1986) (dicta) (decided after *McMahon*)

Schlussel v. Shearson Lehman/American Express, Inc., No. 85-0835 (S.D.N.Y. Apr. 22, 1986) (decided after *McMahon*)

Suthirachartkul v. Shearson Lehman Bros., Inc., No. 85-6469 (S.D.N.Y. May 21, 1986) (decided after *McMahon*)

Weizman v. Adornato, 625 F. Supp. 1101 (E.D.N.Y. 1985)

Third Circuit

Blumenthal v. Dean Witter Reynolds, Inc., No. 84-4799F (D. N.J. July 3, 1985), *reprinted in* 2 RICO L. Rptr. 275 (1985) (appeal pending)

Erlbaum v. Prudential-Bache Securities, Inc., No. 84-5541 (E.D. Pa. Aug. 9, 1985) (appeal pending)

Jacobson v. Merrill Lynch, Pierce, Fenner & Smith, Inc., [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,276 (W.D. Pa. Apr. 19, 1985) (appeal pending)

Fourth Circuit

Blomquist v. Churchill, 633 F. Supp. 131 (D. S.C. 1985)

Glavin v. Prudential-Bache Securities, Inc., 623 F. Supp. 629 (D. S.C. 1985)

Levendag v. Churchill, 623 F. Supp 620 (D. S.C. 1985)

Fifth Circuit

Bustamante v. Rotan Mosle, Inc., 633 F. Supp. 303 (S.D. Tex. 1986)

King v. Drexel Burnham Lambert, Inc., No. 3-Civ-85-000-932-P (N.D. Tex. Oct. 29, 1985), *aff'd*, No. 85-1717 (5th Cir. May 28, 1986)

Seventh Circuit

Barr v. The Illinois Co., No. 84-C-2076 (N.D. Ill. Oct. 29, 1985)

Gibson v. Merrill Lynch, Pierce, Fenner & Smith, Inc., No. 84-C-7542 (N.D. Ill. June 18, 1985)

Goldberg v. Drexel Burnham Lambert, Inc., No. 83-C-8586 (N.D. Ill. Jan. 15, 1986)

Hughes v. Paine, Webber, Jackson & Curtis, Inc., No. 81-C-5075 (N.D. Ill. Nov. 15, 1985)

Robert A. Stone & Assocs. v. Drexel Burnham Lambert, Inc., No. 85-C-6927 (N.D. Ill. Nov. 15, 1985) (appeal pending)

Winkler v. Merrill Lynch, Pierce, Fenner & Smith, Inc., No. 85-C-9120 (N.D. Ill. Apr. 25, 1986)

Eighth Circuit

Bale v. Dean Witter Reynolds, Inc. and *Haertel v. Dean Witter Reynolds, Inc.*, 627 F. Supp. 650 (D. Minn. 1986)

Nesslage v. York Securities, Inc., 107 F.R.D. 389 (E.D. Mo. 1985) (appeal pending)

Phillips v. Merrill Lynch, Pierce, Fenner & Smith, No. 4-81-394 (D. Minn. Apr. 19, 1985), *rev'd*, No. 85-5156 (8th Cir. July 9, 1986)

Webb v. R. Rowland & Co., 613 F. Supp. 1123 (E.D. Mo. 1985) (appeal pending)

Ninth Circuit

Conover v. Dean Witter Reynolds Inc., No. 83-4809 (C.D. Cal. June 12, 1985) (appeal pending)

Schnitzer v. Oppenheimer & Co., 633 F. Supp. 92 (D. Ore. 1985)

Wilcox v. Ho-Wing Sit, 586 F. Supp. 561 (N.D. Cal. 1984)

Tenth Circuit

Adams v. Merrill Lynch Pierce Fenner & Smith, Corp., [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,328 (W.D. Okla. Sept. 20, 1985)

Eleventh Circuit

Gorman v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 609 F. Supp. 1054 (S.D. Fla.), *aff'd*, 780 F. 2d 1032 (11th Cir. 1985) (*en banc* rehearing pending)

Krieck v. Dean Witter Reynolds, Inc., No. GCA 84-0085 (N.D. Fla. Apr. 24, 1985)

Rojas Cancanon v. Smith Barney, Harris Upham & Co., 612 F. Supp. 996 (S.D. Fla. 1985)

Sharp v. Cralin & Co., 617 F. Supp. 476 (S.D. Fla. 1985)

Wolfe v. E. F. Hutton & Co., No. 84-151-Civ-Orl-18 (M.D. Fla. Mar. 30, 1985) (consolidated with *Gorman*) (*en banc* rehearing pending)

C. *Case Stayed Pending Eighth Circuit Decision in* Phillips

Minnesota Odd Fellows Home Foundation v. Engler & Budd Co., 630 F. Supp. 797 (D. Minn. Mar. 3, 1986)

APPENDIX F

District Court Cases Addressing the Enforceability of Agreements to Arbitrate Civil RICO Claims

A. *Cases Holding Civil RICO Claims Arbitrable*

Second Circuit

Brener v. Becker Paribas Inc., 628 F. Supp. 442 (S.D.N.Y. 1985)

Dev. Bank v. Chemtex Fibers Inc., 617 F. Supp. 55 (S.D.N.Y. 1985) (international agreements to arbitrate RICO claims are enforceable)

Wall Street Assocs. v. Becker Paribas, Inc., No. 85 Civ. 4649 (S.D.N.Y. Sept. 19, 1985)

Third Circuit

Baker v. Paine, Webber, Jackson & Curtis, Inc., [Current] Fed. Sec. L. Rep. (CCH) ¶ 92,757 (D. N.J. Apr. 10, 1986)

Bright v. S & N Assocs., No. 85-6966 (E.D. Pa. June 18, 1986) (appeal pending)

Jacobson v. Merrill Lynch, Pierce, Fenner & Smith, Inc., [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,276 (W.D. Pa. Apr. 19, 1985) (modifying on the basis of *Byrd* the court's prior decision in the same case, reported at 605 F. Supp. 510 (W.D. Pa. 1984), that RICO claims are not arbitrable) (decided before *Mitsubishi*) (appeal pending)

Fourth Circuit

Land v. Dean Witter Reynolds, Inc., 617 F. Supp. 52 (E.D. Va. 1985)

Nunes v. Merrill Lynch, Pierce, Fenner & Smith, Inc., No. M-84-3118 (D. Md. Jan. 10, 1986)

Fifth Circuit

Russell v. Shearson Lehman Bros., Inc., No. CA3-85-2335-R (N.D. Tex. Mar. 10, 1986) (appeal pending)

Sixth Circuit

Drazdik v. Kidder Peabody & Co., No. C-85-2442 (N.D. Ohio Mar. 31, 1986) (appeal pending)

Gerhardstein v. Shearson/American Express, Inc., [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,512 (N.D. Ohio Mar. 3, 1986)

Lerchen v. Merrill Lynch, Pierce, Fenner & Smith, Inc., No. 83-CV-1479-DT (E.D. Mich. Nov. 29, 1985)

Yee v. Merrill Lynch, Pierce, Fenner & Smith, Inc., No. 84-4017 (E.D. Mich. Mar. 31, 1986)

Seventh Circuit

Robert A. Stone & Assocs. v. Drexel Burnham Lambert, Inc., No. 85-C-6927 (N.D. Ill. Nov. 15, 1985) (appeal pending)

Steinberg v. The Illinois Co., No. 85 C 7131 (N.D. Ill. May 15, 1986)

Eighth Circuit

Bale v. Dean Witter Reynolds, Inc. and *Haertel v. Dean Witter Reynolds, Inc.*, 627 F. Supp. 650 (D. Minn. 1986)

Bob Ladd, Inc. v. Adcock, 633 F. Supp. 241 (E.D. Ark. 1986)

Ninth Circuit

Blakley v. Prudential Bache Securities, Inc., No. R-85-442 (D. Nev. Dec. 9, 1985)

Sacks v. Dean Witter Reynolds, Inc., [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,429 (C.D. Cal. Dec. 31, 1985)

West v. Drexel Burnham Lambert, Inc., 623 F. Supp. 26 (W.D. Wash. 1985)

Eleventh Circuit

Adrian v. Smith Barney, Harris Upham & Co., No. 84-1652-Civ-T-13 (M.D. Fla. Sept. 17, 1985)

Colangelo v. Dean Witter Reynolds, Inc., [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,365 (M.D. Fla. July 26, 1985)

Crabb v. Merrill Lynch, Pierce, Fenner & Smith, Inc., No. 84-1145-Civ-J-12 (M.D. Fla. Oct. 7, 1985)

Finn v. Davis, 610 F. Supp. 1079 (S.D. Fla. 1985) (decided before *Mitsubishi*)

Greist v. Merrill Lynch, Pierce, Fenner & Smith, Inc., No. 83-6826-Civ (S.D. Fla. Aug. 26, 1985)

Rockoff v. Shearson Lehman/American Express, Inc., [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,513 (S.D. Fla. Feb. 12, 1986)

Ross v. Mathis, 624 F. Supp. 110 (N.D. Ga. 1985)

B. Cases Holding Civil RICO Claims Not Arbitrable

District of Columbia Circuit

Kalali v. Prudential-Bache Securities, Inc., No. 85-3237 (D. D.C. June 30, 1986)

First Circuit

Sevinor v. Merrill Lynch, Pierce, Fenner & Smith, No. 84-3240-N (D. Mass. July 19, 1985) (appeal pending)

Second Circuit

Brill v. Prudential-Bache Securities, Inc., No. 84 Civ. 0846 (S.D.N.Y. June 13, 1986) (dicta) (decided after *McMahon*)

Farino v. Advest, Inc., [Current] Fed. Sec. L. Rep. (CCH) ¶ 92,758 (E.D.N.Y. May 1, 1986) (decided after *McMahon*)

McMahon v. Shearson/American Express Inc., 618 F. Supp. 384 (S.D.N.Y. 1985), *aff'd in part, rev'd in part*, 788 F.2d 94 (2d Cir. 1986)

S.A. Mineracao da Trindade-Samitri v. Utah Int'l Inc., 576 F. Supp. 566 (S.D.N.Y. 1983), *order certified for interlocutory appeal*, 579 F. Supp. 1049 (S.D.N.Y.), *appealed on other grounds and affirmed*, 745 F.2d 190 (2d Cir. 1984) (decided before *Mitsubishi*)

Suthirachartkul v. Shearson Lehman Bros., Inc., No. 85-6469 (S.D.N.Y. May 21, 1986) (decided after *McMahon*)

Weizman v. Adornato, 625 F. Supp. 1101 (E.D.N.Y. 1985)

Third Circuit

Blumenthal v. Dean Witter Reynolds, Inc., No. 84-4799F (D. N.J. July 3, 1985), *reprinted in* 2 RICO L. Rptr. 275 (1985)

Jacobson v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 605 F. Supp. 510 (W.D. Pa. 1984) (decided before *Mitsubishi*), *modified after Byrd*, [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92, 276 (W.D. Pa. April 19, 1985) (appeal pending)

Witt v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 602 F. Supp. 867 (W.D. Pa. 1985) (decided before *Mitsubishi*)

Fourth Circuit

Fisher v. Prudential-Bache Securities, Inc., No. Y-86-388 (D. Md. May 12, 1986) (appeal pending)

Universal Marine Ins. Co. v. Beacon Ins. Co., 588 F. Supp. 735 (W.D.N.C. 1984) (decided before *Mitsubishi*)

Seventh Circuit

American Concept v. Irsay, No. 84 C 0026 (N.D. Ill. Oct. 4, 1985) (appeal pending)

Myers v. Rosenberg, No. 83-C-1342 (N.D. Ill. Mar. 6, 1986)

Eighth Circuit

Webb v. R. Rowland & Co., 613 F. Supp. 1123 (E.D. Mo. 1985) (appeal pending)

Ninth Circuit

Wilcox v. Ho-Wing Sit, 586 F. Supp. 561 (N.D. Cal. 1984) (decided before *Mitsubishi*)

Eleventh Circuit

Pruzan v. Paine, Webber, Jackson & Curtis, Inc., No. C84-2016A (N.D. Ga. Aug. 30, 1985)

Roes v. Paine, Webber, Jackson & Curtis, Inc., No. C84-2311A (N.D. Ga. Mar. 29, 1985) (decided before *Mitsubishi*)